Supreme Court, U.S.
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No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 2006
CERTIORARI GRANTED MAY 30, 2006

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CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

No. 970503957

Joann Williams-Branch, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff,

v.

RJ Reynolds Tobacco Company, *et al.*,

Defendants

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
5/21/97	1	COMPLAINT filed by plaintiff in Multnomah Circuit Court.
9/26/97	9	COMPLAINT AMENDED, adding defendant Phillip Morris Inc.
11/16/98	70	Plaintiff's MOTION TO AMEND COMPLAINT to add Punitive Damages is filed.
2/17/99	134	FOURTH AMENDED COMPLAINT filed by plaintiff.
21/19/99	135	ANSWER TO FOURTH AMENDED COMPLAINT filed by defendant.
3/26/99	149	Defendant files proposed JURY INSTRUCTIONS.
4/1/99	185/186	Verdict in trial in favor of the plaintiff, awarding punitive damages on fraud claim and no punitive damages on negligence claim.

DATE	#	DOCKET ENTRY
4/19/99	191	Defendant Phillip Morris Inc. files MOTION for reduction of Punitive Damages Award.
5/24/99	199	Defendant Phillip Morris Inc. files MOTION for new trial.
5/20/99	201	JUDGMENT of the Multnomah Circuit Court filed.
6/03/99	208	ORDER on defendant's motion for reduction of punitive damages; granted in part reduced to $32 million.
6/22/99	213	ORDER denying defendant's motion for new trial.
6/22/99	214	NOTICE of entry of judgment.

OREGON COURT OF APPEALS

No. A106791

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff-Appellant,

Cross-Respondent,

v.

Phillip Morris Incorporated,

Defendant-Respondent,

Cross-Appellant,

and

RJ Reynolds Tobacco Co., *et al.*

Defendants

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/22/99	1	Notice of Appeal filed.
10/26/01	96	Oral Argument.
6/5/02	109	OPINION of Court of Appeals, re-instating full punitive damages and remanding to the Circuit Court.
11/17/03	149	ORDER received from United States Supreme Court Remanding case.
6/9/04	177	OPINION OF Court of Appeals, reinstating punitive damages and remanding to the Circuit Court.

SUPREME COURT OF OREGON

No. S49755

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff, Respondent on Review,

v.

Phillip Morris Incorporated,

Defendant, Petitioner on Review,

and

RJ Reynolds Tobacco Co., *et al.*

Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
9/11/02	1	Petition for review FILED.
12/24/02	17	Petition for review DENIED.
9/29/04	1	Petition for review FILED.
12/21/04	17	Petition for review ALLOWED.
5/10/05	50	Oral Argument.
2/2/06	52	Opinion affirming Court of Appeals.

SUPREME COURT OF THE UNITED STATES

No. 02-1553

Phillip Morris USA Incorporated,

Petitioner,

v.

Mayola Williams, Personal Representative
of the Estate of Jesse D. Williams, Deceased,

Respondent.

RELEVANT DOCKET ENTRIES

DATE		DOCKET ENTRY
04/26/03		Petition for writ of certiorari filed.
10/06/03		Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, deceased,
by and through his personal representative,
JOANN WILLIAMS-BRANCH,

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

Case No. 9705-03957

FOURTH AMENDED COMPLAINT
(Product Liability,
Negligence and Deceit)

NOT SUBJECT TO
MANDATORY ARBITRATION

Plaintiff alleges:

GENERAL ALLEGATIONS
AND REMEDIES SOUGHT

1. Plaintiff, Joann Williams-Branch, is the duly appointed Personal Representative of the Estate of Jesse D. Williams, her father, who died March 17, 1997 aged 67 years. Plaintiff is one of decedent's six surviving children whose names and ages are: Glenn, age 43; Darlene, 42; Joann, 41; Jesse Jr., 39; Freda, 37; and [P.2] Calvin, 35, all of whom are beneficiaries of this action for wrongful death. The decedent's wife of 45 years, Mayola Williams, is also a beneficiary to this action for wrongful death.

2. Jesse D. Williams died from poorly differentiated adenoquamous carcinoma causing cardiopulmonary arrest, which was caused by tobacco smoke due to his long term addiction to smoking Marlboro brand cigarettes. Decedent

smoked Marlboro cigarettes from in or about 1955 until in or about 1997.

3. Decedent Jesse D. Williams was 67 years old at the time of his death. He had retired from the Portland Public School District in 1991, but continued to maintain his own business, which he had operated for 20 years, until March 1997, when he was no longer able to work due to his illness. He married Mayola Williams on December 24, 1952, and lived in Portland, Oregon. At the time of decedent's death, Mayola Williams was 64 years old.

4. As a further result of the conduct of defendants which caused the death of Jesse D. Williams, he and his estate have incurred economic damages for medical expenses in the amount of $20,801.80, and funeral expenses in the approximate amount of $684.

5. As a result of the wrongful death of Jesse D. Williams, decedent's children have been deprived of the companionship, society, support, love, affection, guidance, and parenting, of their beloved [P. 3] father for the remainder of their lives; Mayola Williams has been deprived of the companionship, society, support, love, affection, guidance; coparenting, and consortium, of her beloved husband for the remainder of her life; and the Estate of Jesse D. Williams has suffered additional damages for his fear and mental, emotional and physical pain and suffering from the onset of the symptoms of his lung cancer in or about October 1996, until his death on March 17, 1997, all of which entitle the estate to reasonable compensation for non-economic damages in the amount of $1,000,000.

FIRST CLAIM FOR RELIEF — PRODUCTS LIABILITY

6. Plaintiff incorporates the allegations of paragraphs 1 through 5 above.

7. At all times from approximately 1954 until the present, defendant Philip Morris, Inc. designed, distributed, marketed, advertised and supplied the Marlboro brand cigarettes which caused Jesse D. Williams' disease and death.

8. At all material times, the cigarettes produced and distributed by defendant tobacco company were of defective design, unreasonably dangerous, and dangerous beyond the reasonable expectations of ordinary consumers in one or more of the following respects:

a. Defendant had added ammonia to increase the effects of nicotine; [P. 4]

b. Defendant had altered the pH of cigarettes or cigarette smoke so as to increase the effect of nicotine;

c. Defendant had controlled and manipulated the amount of nicotine in its cigarettes in such a way as to maintain the physical dependence of plaintiff and other smokers on its cigarettes; and

d. Defendant added sugars to its cigarette tobacco so as to increase the effect of nicotine.

9. Defendant Philip Morris Incorporated has shown a reckless and outrageous indifference to a highly unreasonable risk of harm, and has acted with a conscious indifference to the health, safety and welfare of others. Defendant Philip Morris Incorporated has exploited the inability of smokers to stop smoking, used nicotine to keep smokers smoking, exploited the psychological needs of the young and relied on them as replacement smokers for those who die because of the adverse health effects of its cigarettes. The effects of defendant's products are widespread and deadly, and defendant has known this for many years. Defendant has deceived the public concerning the health dangers of cigarettes and the addictive properties of nicotine. Defendant has derived enormous profits from the sales of cigarettes. Defendant is

liable for punitive damages in the amount of $100 million. [P. 5]

SECOND CLAIM FOR RELIEF — NEGLIGENCE

10. Plaintiff incorporates the allegations of paragraphs 1 through 9 above

11. The conduct of defendant tobacco company in designing, testing, controlling, processing, manufacturing, assembling, distributing, and supplying, the Marlboro brand of cigarettes, was negligent in one or more of the following ways:

a. In avoiding testing of tobacco, tobacco smoke, and cigarettes that would be likely to relate human disease to smoking;

b. In processing, controlling and manipulating the contents and proportions of various substances in cigarettes in such a way as to continue and/or enhance the habit-forming and/or addictive effects of those products on users, specifically by

(1) adding ammonia to increase the effects of nicotine;

(2) altering the pH of cigarettes or cigarette smoke so as to increase the effect of nicotine;

(3) controlling and manipulating the amount of nicotine in its cigarettes in such a way as to maintain the physical dependence of plaintiff and other smokers on its cigarettes; and

(4) adding sugars to its cigarette tobacco so as to increase the effect of nicotine. [P. 6]

c. In selling and distributing cigarettes which it knew or should have known contained poisonous and carcinogenic substances capable of causing and likely to

cause numerous serious and fatal injuries and diseases, including but not limited to cancer of the lungs;

d. In selling and distributing products which it knew or should have known contained habit-forming and addictive substances capable of and likely to induce irresistible habits and/or physical and psychological dependence and addiction when used in a foreseeable manner; and

e. In failing to manufacture and sell cigarettes without the characteristics described in c. and d. above, thus depriving Jesse Williams of the opportunity to smoke a safer cigarette.

The failures to test described in subparagraph a. above were part of defendant's plan to claim ignorance concerning the relationship between cigarette smoking and health.

THIRD CLAIM FOR RELIEF — DECEIT

12. Plaintiff incorporates the allegations of paragraphs 1 through 9 above.

13. Defendant tobacco company recklessly and/or intentionally made fraudulent misrepresentations about its Marlboro tobacco products, including deceitful statements about adverse health effects, the addictive nature of its tobacco products, and their contents. [P. 7]

14. Defendant tobacco company engaged in an ongoing public relations effort beginning in the early 1950s, outside its advertising and promotion activities, designed to manipulate public opinion by creating doubt about the adverse health effects of smoking without actually denying them, and to provide rationalizations to help smokers keep smoking in spite of the adverse health effects. Many of these activities were carried out by the Tobacco Industry Research Council, Council on Tobacco Research, and Tobacco Institute, of which defendant was a member. Defendant's statements were

intended to and did cause cigarette smokers such as plaintiff's decedent to continue smoking their cigarettes in spite of their adverse health effects.

15. Decedent did not know defendant tobacco company's representations were false. Decedent reasonably relied on, and suffered and died as a result of defendant tobacco company's misrepresentations.

16. Defendant tobacco company's deceitful statements comprised a campaign beginning in the early 1950s and consisting, among other things, of the following misrepresentations and similar misrepresentations:

a. That defendant accepted "an interest in people's health as a basic responsibility, paramount to every other consideration in our business" in its 1954 "Frank [P. 8] Statement" published in 448 newspapers with circulation of over 43 million in 258 cities in the United States;

b. That there is "no proof" that cigarette smoking is a cause of lung cancer or other human disease, in the 1954 "Frank Statement";

c. In a 1954 statement by Parker McComas, CEO of Philip Morris, that "if the industry leaders really believed that cigarettes caused cancer, they would stop making them";

d. In a 1962 statement by Philip Morris President Joseph Cullman to the Philip Morris annual stockholders meeting that, if there were a connection between cigarette smoking and human disease, defendant would not be in the business of making and selling cigarettes;

e. In a 1963 statement by Philip Morris executive assistant James Bowling to Thomas Whiteside of the New Yorker that the tobacco companies "believe there is

no connection or we wouldn't be in the business"; and at other times;

f. That the causal link between cigarette smoking and human disease was in doubt or "had not been proven" in repeated statements during the past 50 years;

g. That defendant always had and always would cooperate closely with "those whose task it is to safeguard the public health," in the 1954 Frank Statement and in similar statements since;

h. That cigarettes are not addictive, as in April 14, 1994 statements at Congressional hearings. [P. 9]

WHEREFORE, plaintiff prays for judgment in favor of the Estate of Jesse D. Williams against defendants, and each of them, in the amount of $26,485.80 for economic damages, and the further amount of $1,000,000 for non-economic damages, and the further amount of $100 million for punitive damages against defendant Philip Morris Incorporated, and for its costs and disbursements incurred herein.

CERTIFICATION TO COURT

The undersigned attorneys certify upon reasonable knowledge, information and belief, formed after making of such inquiry as is reasonable under the circumstances, that this document is not presented for any improper purpose, and that the legal positions contained herein are warranted by nonfrivolous application or modification of existing law, and that the undersigned reasonably believe that every and all allegations will be supported by evidence after further investigation and discovery.

DATED this 17th day of February, 1999.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, deceased,
by and through his personal representative,
JOANN WILLIAMS-BRANCH

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

No. 9705-03957

ANSWER OF DEFENDANT PHILIP MORRIS INCORPORATED TO PLAINTIFF'S FOURTH AMENDED COMPLAINT

Defendant Philip Morris Incorporated ("Philip Morris") answers plaintiff's Fourth Amended Complaint ("Complaint") as follows:

1. Philip Morris admits that Joann Williams-Branch is the Personal Representative of the Estate of Jesse D. Williams and that Jesse D. Williams died on March 1, 1997. Philip Morris is without knowledge or information sufficient to form a belief as to [P. 2] the truth of the remaining allegations contained in Paragraph 1 of the Complaint, and therefore denies the same.

2. Philip Morris is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of the Complaint that Jesse D. Williams died from poorly differentiated adenosquamous carcinoma causing cardiopulmonary arrest or that he smoked Marlboro cigarettes from 1955 until 1997, and, therefore, denies the same. Philip Morris denies the remaining allegations contained in Paragraph 2 of the Complaint.

3. Philip Morris is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and therefore denies the same.

4. Philip Morris denies the allegations contained in Paragraph 4 of the Complaint.

5. Philip Morris denies the allegations contained in Paragraph 5 of the Complaint.

6. As to the allegations contained in Paragraph 6 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 5 of the Complaint. [P. 3]

7. Philip Morris admits that it has designed, sold to distributors, marketed, and advertised Marlboro cigarettes from 1954 to the present. Philip Morris denies the remaining allegations contained in Paragraph 7 of the Complaint.

8. Philip Morris denies the allegations contained in Paragraph 8.

9. Philip Morris denies the allegations contained in Paragraph 9.

10. As to the allegations contained in Paragraph 10 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 9 of the Complaint.

11. Philip Morris denies the allegations contained in Paragraph 11 of the Complaint.

12. As to the allegations contained in Paragraph 12 of the Complaint, Philip Morris incorporates by reference its responses to Paragraphs 1 through 9 of the Complaint.

13. Philip Morris denies the allegations contained in Paragraph 13 of the Complaint. [P. 4]

14. Philip Morris denies the allegations contained in Paragraph 14 of the Complaint.

15. Philip Morris denies the allegations contained in Paragraph 15 of the Complaint.

16. Philip Morris denies the allegations contained in Paragraph 16 of the Complaint.

DEFENSES

First Defense

Plaintiff's Complaint fails to state ultimate facts sufficient to constitute a claim for relief against Philip Morris upon which relief can be granted. ORCP 21A(8).

Second Defense

Plaintiff's claims against Philip Morris are preempted and barred by the operation of the Supremacy Clause of the Constitution of the United States and the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. §§ 1331 *et seq.*

Third Defense

Plaintiff's claims against Philip Morris are barred, in whole or in part, by the applicable statutes of limitations and/or repose. [P. 5]

Fourth Defense

Plaintiff's claims against Philip Morris are barred because the characteristics of Philip Morris' cigarettes alleged in plaintiff's Complaint to constitute defects were open and obvious.

Fifth Defense

Plaintiff's claims are barred, in whole or in part, by the comparative negligence or fault of decedent in one of more of the following particulars:

1. Decedent chose not to follow warnings regarding the health risks of smoking and advisory statements regarding the benefits of quitting.

2. Decedent chose not to quit smoking.

3. Decedent failed to seek medical or other professional assistance to quit smoking.

Sixth Defense

Plaintiff's claims are barred, in whole or in part, by Oregon's adoption of § 402A of the Restatement (Second) of Torts, Comment i.

Seventh Defense

If plaintiff's decedent was injured or damaged, which injuries and damages are denied, the injuries and damages were caused solely by the acts of decedent himself or by preexisting conditions, other persons, entities, forces, and/or things of which Philip Morris had no control and for which Philip Morris is not responsible. [P. 6]

Eighth Defense

While denying at all times that any product manufactured by Philip Morris caused or contributed to the injuries and damages alleged by plaintiff in her complaint, Philip Morris avers that plaintiff and/or her decedent were warned or otherwise made aware of the alleged dangers of the product and further, that any such dangers, if they existed, were not beyond that which would have been contemplated by an ordinary consumer of the product. Plaintiff, therefore, is barred from any recovery on the claims asserted.

Ninth Defense

Plaintiff's claims are barred, in whole or in part, by the First Amendment to the United States Constitution and by the Constitution of Oregon Article I, § 8.

Tenth Defense

Plaintiff's claim for noneconomic damages is barred to the extent that it exceeds the $500,000.00 cap in ORS 18.560(1).

Eleventh Defense

Philip Morris hereby reserves its right to amend its Answer to assert other and related defenses as may become necessary.

DEMAND FOR JURY TRIAL

Defendant Philip Morris hereby demands trial by jury. [P. 7]

WHEREFORE, Philip Morris, having fully answered plaintiff's Complaint, prays for judgment in its favor.

DATED: February 19, 1999.

LINDSAY, HART, NEIL & WEIGLER, LLP

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EXCERPTS OF RELEVANT TRIAL TESTIMONY AND ARGUMENTS IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

[Vol. 3-A] [Plaintiff's Opening Argument (Feb. 24, 1999)]

* * *

[Tr. 39] To this day, they choose to deny any and all responsibility for the massive harm caused to millions of people by their product, including Jesse Williams and his family, and to blame every bit of the lung cancer problem and the other health problems on those souls who chose to buy and use their products.

Now, to be sure, each smoker made choices, too. And Jesse Williams, through his family, accepts his share of that responsibility for which he's paid the ultimate price. But today, as we begin this trial, 100 percent of the burden of that choice is on the Williams' family, while Philip Morris escapes any responsibility.

Now, I would like to take you back into a little bit of history to see how this modern injustice came to pass so you can start to put the choices made by Philip Morris executives into historic perspective.

I think I'm going to display my limitations as an artist, but it will help me talk through this to just give you a little bit of an ongoing time line, and there's a time line behind here that we will talk about, but I'm going to give you just another one, a sketchy one

* * *

[Vol. 3-B] [Plaintiff's Opening Argument (Feb. 24, 1999) (continued)]

* * *

[Tr. 3] Plaintiff's Opening Statement

OPENING STATEMENT (Continuing)

BY MR. THOMAS:

Thank you, Judge. The air is moving.

This is my portion of the opening statement, and I am going to try to be done by 3:45, so I am going to move fast.

We talked about this case being about choices and about responsibilities. Let me say at the outset, Jesse Williams has made choices and his family accepts responsibility for those choices, and asks you to consider and compare the choices that Jesse Williams made with the choices that Philip Morris made.

And you know that the development of knowledge about tobacco was being played out in a big way. And the role that tobacco plays and has played in our lives before cigarettes came into existence goes way back.

I am going to show you a smaller time line, it's blank, and this is the time line of Jesse Williams' life. I want to introduce to you the testimony that we anticipate producing in relation to him, so you can know a little bit about who he is.

* * *

[Tr. 14] who's in, no matter what the score is, "I got to take a smoke," and that was the course of this man's life.

I want to talk to you a little bit about the legal claims in this case, I know the defense is going to talk a little bit about that, and I just want to clarify a couple things.

First of all, there is not a claim in this case by the plaintiff, and we know the warnings changed, right, over the

years, there is not a claim in this case that these legal warnings were inadequate; and, therefore, we have a right to have a lawsuit against Philip Morris in this case. There is no claim about that. That's their defense.

Our claim is that what they did and what they actually put but into these cigarettes, and what they said, that's the basis of the claim: What they told the American public, what they did to the American public, Jesse Williams being a part of it, that's what creates the claim in this case.

Now there are some words for it, and we're going to hear more about this at the end, [Tr. 15] but in a couple of words, product liability defect, because what Philip Morris put into the cigarettes was different from what people expected.

People thought cigarettes have tobacco. What Philip Morris did was to create nicotine delivery systems that use chemical enhancement to make it so the kick from cigarettes was harder and that in the course of doing that, they created a higher market share for themselves to the point now where cigarettes sold by Philip Morris are almost half of the United States market, and Marlboros are over one-third of the cigarettes sold in the United States. And these things were beyond consumer expectations about what a cigarette is all about.

Second, what Philip Morris did was negligent. It was negligent; that they did not behave as a reasonable manufacturer would. Now, in regard to this, you can take into account what Jesse knew, what Jesse was told, and you can also take into account what Jesse — who Jesse was, and you can also take into account who Philip Morris is, and who had the broadest [Tr. 16] space of information.

There is going to be a war in this case in this courtroom about what did Jesse know. And you're going to have to go through it. Philip Morris has gone back to the school books

that he had about the dangers of tobacco or the bad things of tobacco from back in the 40s.

And on the other hand, the plaintiff was going to be presenting evidence from back then about how the weight of what people saw and the images of what people saw about cigarettes and tobacco created an altogether different image. It was glamorous.

The Marlboro man with the tattoo appealed to a guy coming back from the service who had just fought for his country. The Marlboro man was a person who had life that was full of adventure, and that Marlboro man image appealed to Jesse Williams and he stuck with it over the course of his life.

The actual medical causation in the case in the claim by the plaintiff is that the cigarettes that Jesse Williams smoked, from 1988 to when he died in 1997, were a substantial factor in causing his cancer. Now, this is an [Tr. 17] important point, not the only cause, but a substantial factor.

In other words, substantial means not insignificant. At the end of the case, the judge will give you a jury instruction called causation, and if you have questions about what does causation mean, how certain do we have to be that those cigarettes after 1988 caused Jesse Williams' cancer, that's the standard against which you will apply the evidence that you've learned and what you will hear from his treating doctors.

Now, I'm not talking about some doctors brought in by either side after this became a lawsuit. I mean the people who treated Jesse Williams because he was their patient. The testimony from these local physicians will be that those cigarettes were a substantial factor in causing his death. And in fact, Dr. Segal, who is his treating physician, testified and will testify and wrote in this letter, "Mr. Williams' lung cancer" — can you see it? "was almost certainly caused by ciga-

rette smoking. He smoked two packs a day for 45 years when his lung cancer was diagnosed, and he

* * *

[Tr. 24] knew, and what responsibility did Philip Morris have for this based upon what they knew and what they said and what they did.

Now, I don't have much time, so I am going to give you a couple of legal concepts that I would at least like for you to have in the back of your minds. In regard to the product liability and the negligence claims, we said that we accept responsibility for what Jesse Williams did.

Does Philip Morris accept responsibility for that what they did? We're going to find out in a few minutes when Mr. Cofer talks to you, but it is anticipated from the denial of the allegations in the complaint that they're going to take an approach that goes like this.

One, it's not proven that cigarettes cause cancer. Two, cigarettes didn't cause this cancer. And three, even if cigarettes do cause cancer, Jesse Williams knew what he was doing. Now, you're going to have to think your way through that and make up your mind about who shares responsibility based upon what you've seen and what you will see about how this company has behaved from the beginning when it

* * *

[Defendant's Opening Argument (Feb. 24, 1999)]

* * *

[Tr. 46] can probably see that I have Williams' facts in red, and I have smoking and health facts in blue.

But as you heard, Mr. Williams was born in 1929 in Crockett, Texas. He lived, grew up and went to school there. June of 1948, he joined the Army, and it was some time in 1950, he was stationed in Korea and he began smoking.

Now, you heard reference to early tobacco ads. There will be no evidence that ads had anything to do when Mr. Williams began smoking. In fact, counsel conceded Mr. Williams began smoking because he was told that smoke would keep the mosquitoes off.

Sometime in the next year, Mr. Williams met Mrs. Williams, and I believe it was Christmas Eve of '52 that they were married, Mr. Williams was discharged from the service in June of 1953. Now, in her deposition, Ms. Williams testified that in the early years of their marriage, Mr. Williams smoked less than a pack a day.

Now, let's look how the evidence linking cigarette smoking to lung cancer was developing at the same time. The evidence that ties

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[Tr. 60] that Mrs. Williams used to urge her husband to quit smoking, telling him the cigarettes would kill him. His children told him the same thing.

Mr. Williams himself told his children not to smoke. He told them it was a bad habit and would rot their teeth. When he caught his son, Calvin, secretly smoking, he chased him on off the porch with a broom handle. When he caught his other two sons, he gave them a big lecture about it.

Mr. Williams himself used the words, "cancer sticks," in referring to his cigarettes. Other members of Mr. Williams' family used to try to get him to quit. His brother-in-law, Eddie, quit cold turkey in 1969, tried to encourage Mr. Williams to quit.

Both of Mr. Williams' sisters told him he should quit smoking. As I think Mr. Thomas told you, the family became particularly concerned in 1970 when Mr. Williams developed a strong cough, the family and his doctors attribute to cigarette smoking.

The Court will instruct you that under Oregon law a product is defective and unreasonably dangerous only, only, if it is more

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[Vol. 4-A] [Testimony of Neal Benowitz (Feb. 25, 1999)]

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[Tr. 84] Now, it turns out that all drugs of abuse work by releasing dopamine. So, you sort of stimulate an excessive amount of these pleasure centers that normally respond to other things. If something good happens to you or, you know, you're feeling great one day, you might have pleasure from your own chemicals.

But taking drugs artificially stimulates these pleasure centers. And —

Q. Is that one of the reasons why people take them?

A. Yes, that is one of the reasons why.

Also, there are very localized areas of the brain and very specific for release of dopamine which is common to all drugs of abuse. And if you block dopamine release you can, in animals, you can cause injury to the dopamine parts of the brain.

And in animals you might model drug abuse. You can teach animals to take cocaine, heroin or nicotine. If you block these dopamine areas in the brain, very small areas, the animals will not take the drugs anymore. So that is the really the key part of what the rewards are taking the drugs.

Now, there are other things nicotine [Tr. 85] does, as well. It causes hormones that cause stimulation, that cause arousal, that cause relaxation, that reduce stress, that reduce appetite.

So that when smokers take nicotine they can really manipulate or control their moods in a lot of ways. It helps them sort of become vigilant when they get up in the morning. Helps you concentrate, if you are tired. It can help you relax you if you have been stressed. It can help you not eat if you are trying to diet. There's a lot of different things that people use nicotine for.

And when you are smoking many cigarettes a day, you can really dose yourself with nicotine hundreds of times per day, and regular smokers come to rely on effects of nicotine to really control their moods and modulate their needs. When they need a lift, they smoke a cigarette. When they need to relax, they smoke a cigarette. And regular smokers get to depend on effects of nicotine to influence the activity of their own brain systems.

So that is sort of the first part of addiction.

Q. Is that the way that the human feels [Tr. 86] different when they take a drag off of a cigarette that the nicotine is changing in a chemical way their nerve function?

A. Yes.

Q. Is that what it's all about?

A. That is part of it.

Q. Okay.

A. So, part of it is that nicotine is doing things to modulate your mood. The second part has to do with the changes that occur when a person becomes a regular smoker.

Q. Okay.

A. And what happens when the brain gets stimulated in some way that is perceived as excessive, it tries to react to it to bring itself back to normal. And what develops is something called tolerance, which means you get an effect of a drug the first time. The second time you get less of an effect. The third time you get less of an effect. The body is trying to bring itself back to normal function. And it's well known that tolerance develops on a variety of drugs of abuse, including nicotine.

Now, when tolerance develops, it's

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[Tr. 89]A. They are. And it depends on several factors. One thing is that we know that different people have different genetic makeup of nicotine receptors and also dopamine receptors and different receptors in the brain.

So, we know there is a lot of differences from person to person in terms of what nicotine does for them. And that is why some people who try cigarettes and don't like them, don't find them rewarding, never become smokers. Some people try cigarettes and never stop smoking for the rest of their lives.

And then most people who become smokers try cigarettes, they become smokers. And, you know, a lot quit. Some don't. But there's a whole spectrum. A lot of that has to do with the brain structure genetics and also what people get from smoking.

Some hormones like serotonin is a hormone that gets released by nicotine that has a role in dealing with depression. Some of the drugs for depression work by increasing serotonin, as well.

Q. Is that like that Prozak drugs?

A. Like Prozak. And so some smokers, for example, find that when they smoke they feel less

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[Tr. 107] Q. All right. And we'll do that with a new page, before, but before we leave this one, this is a request for an expert opinion.

Does this chemical reaction and the way at that it feels to a smoker, a habituated smoker, and the absence when it is not happening, in other words, when the person isn't smoking, does that play a role in whether or not that person is more or less likely to be addicted to cigarettes?

A. Yes, I believe it does.

Q. And could you just describe that for the jury before we leave this chart, please?

A. Well, the concept of addiction means that you — that it's difficult to be without a drug. It causes disruption in how you feel, how you function without the drug. And when you are a regular smoker and your brain is used to nicotine, and your receptors have changed and your brain function has changed, you need nicotine to feel normal, and if you don't have it, you feel bad, you get irritable, you get grumpy, you fight with people, you can't concentrate, you can't do your job, a bunch of you can't sleep well. Different people have different symptoms. But it's common that people just don't feel well when they quit

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[Vol. 4-B] [Testimony of Neal Benowitz (Feb. 25, 1999)]

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[Tr. 15] A. Well, more nicotine exposure means a potential for greater addiction; and, in fact, for our data that I reviewed for and are published in the Surgeon General's Report on ethnic differences that suggests that addiction is more severe in black smokers and black men in particular than white men.

Q. And does that have to do with the success in quit rates?

A. Yes. For the same number of quit rates, black men are less successful at quitting than white men who smoke the same number of cigarettes.

Q. Let me interrupt you because I just kind of passed over that. Does quit rate have to do with the rate or number of persons in a particular category in terms of their success relative to persons in a different category?

A. Yes. If you look at a certain number of smokers, one question is how many quit, but if you are looking at the question of dependence or addiction, you need to know how many have tried to quit as well, and so studies have looked at both issues. Interest in quitting, the number of quit attempts and successful quit attempts, and with [Tr. 16] the same interest in quitting and same number of quit attempts, black men are less successful than white men.

Q. Are you aware that in this case, Jesse Williams tried a number of times, but was unsuccessful ultimately in quitting smoking cigarettes before he died?

A. Yes, I am.

Q. Well, I would like to just go then into the question of quitting. We have had some reference to, I think the number was to 50 million Americans had quit smoking cigarettes.

Are there a number of people who have tried and been successful in quitting smoking?

A. Yes.

Q. Is that figure about right?

A. Yes. I am not sure it's exactly 50 million. It might be 45 million, or 50, but a fair number of smokers have quit smoking successfully.

Q. From the standpoint of your studies, what observations have you made about — now I would like to go broader than the study of African Americans — about people's ability to quit smoking once they decide to try?

[Tr. 17] A. One of the striking things that everyone had found is the variability of that. We know some things predict easier quitting: People who smoke fewer cigarettes, people who have been smoking cigarettes for fewer years. There are other calculations, other predictors; but we know on average, it's difficult for smokers to quit, so the average smoker even though the average smoker who quits tries — makes serious quit attempts at least four or five times before they succeed, and it takes them many years, so it is not an easy thing for most smokers to do. Now, some people are lucky, some smokers are lucky and they're able to quit on the first try. Some smokers try over and over and over again and can never successfully quit, so there is a big spectrum of variation. And that's true for all drugs of addiction. There are some people who occasionally use cocaine at parties and never use too much of it, and never seem to get into trouble, and other people, once they start using cocaine, cannot control it and have severe health problems from it, and the same thing is true with alcohol.

There is variation in addiction

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[Tr. 19] were not widely publicized as they were later and have been smoking for years and years, have you worked with them in their efforts to quit?

A. Yes.

Q. In terms of the physiological and psychological results that occur during the quitting process, could you tell us about some of the things that they encounter?

A. Well, they're different problems different people have. Some of my patients have said, "I just feel lethargic, I have no energy. I just can't do my daily activities." Some people say, "I can't concentrate, I can't focus, I can't think straight." Some people say, "I just feel depressed and smoking makes me feel better," so there are different reasons. Some people can't really say why, they just say, "I can't quit. Whenever I quit, I just have this very intense urge to have a cigarette," and they really can't ever explain why, but they just can't do it. These are people who know very well the health risks of smoking, because every visit in our hospital we chart, "Are you a smoker or not?" And every time I see a person that's a [Tr. 20] smoker, I say, "You have to quit smoking because smoking is going to kill you. The best thing you can do for your health is quit smoking." Even after heart attacks, which you would think would shock people into quitting smoking, only about 50 percent of smokers are successful in quitting. So even though they know very well that smoking could cause another heart attack, half the people still smoke because they're highly addicted.

Q. In regard to Jesse Williams, were there any similarities in terms of his use of cigarettes with the patients who you treated in the clinical practice?

A. Yes.

Q. Could you describe generally for the jury what some of those similarities are.

A. Well, some of the characteristics of Jesse Williams are really those of a highly addicted smoker. He smoked for 45 or more years. He smoked from one to three packs of cigarettes per day. He smoked three packs of cigarettes a day for more than ten years.

And someone smoking three packs of cigarettes per day is smoking one cigarette every [Tr. 21] 15 to 20 minutes when you are awake. And since it takes about 7 to 8 minutes to smoke a cigarette, it means you're spending half of your waking hours with a cigarette lit smoking it. You can see a tremendous amount of one's life is taken up by smoking cigarettes.

One of the characteristics of addicted smokers is that when they wake up in the morning after sleep, they have a tremendous need for a cigarette, and one of the clinical questions that is used to access dependence is, "How long is it after you wake up in the morning do you have your first cigarette that day?"

And very addicted smokers had their first cigarette within minutes. He was one who had his first cigarette as soon as he woke up. In fact, when he woke up in the morning at 4:00 or 5:00 in the morning for some other reason, coughing or something like that, he would have a cigarette or two, even at 4 o'clock in the morning.

He was very much in the line of my highly dependent smokers who just — it's the first thing they do. Another thing that highly dependent smokers do is they plan to make sure they always have cigarettes available. [Tr. 22]

And again, the history of Jesse Williams indicates that he would make sure the night before he had cigarettes, and if he didn't have them for the next morning, he would go out a buy them to make sure there would always be cigarettes available. It was a very high priority thing to do.

My patients often have tried numerous times to quit. They'd use patches and gum. The same thing for Jesse Williams. He is reported to have tried to quit 20 or more times. He used patches and gum. He smoked even when he was using patches, so more nicotine than normal.

And when he couldn't smoke, he became irritable, he became angry, was hard to live with, and those are also characteristic features of my addictive smokers. When he started to get sick with bronchitis before his lung cancer, doctors told him to quit smoking and he did not quit smoking.

Another characteristic, even when there is a compelling health reason not to smoke, addictive smokers will often keep on smoking. His family was stated to have asked him over and over and over again to quit smoking many times; his [Tr. 23] wife and his children and all of them, and he was not able to quit.

These are all characteristics of highly addicted smokers which I have in my clinic with heart disease, and they keep on smoking, and this was shown by Jesse Williams.

Q. Thank you. Now, we talked about how nicotine affects the way that people think. Does it also affect the way people think about and by people, I mean the way the habituated or addicted smoker thinks about risk?

A. Well, when you are thinking about making a choice about a risky behavior, like smoking, any choice is determined by a lot of the factors on both sides. Choices are influenced by your experience, so a person on the side of wanting to quit would be influenced by health risks, by family pressures, by the cost of buying cigarettes, those are some of the main reasons that suggest why you should quit.

On the other side are factors such as the difficulty of quitting and how it is disruptive to your life. And when a smoker is deciding, a conscious thing to do as people are making decisions of what behaviors to engage in and what

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[Tr. 26] BY MR. THOMAS:

Q. Okay. I am going to try to resume. What does addiction do in regard to whether a person is going to be likely to go in the direction of additional thinking about the risk or in the direction of satisfying the need for the nicotine?

A. Well, one thing which addiction does, and this is true for tobacco and other drugs, is a person would like to find any excuse they have to keep on doing what's easier to do, which is not to quit smoking, and that will clearly influence your interpretation of things like warnings.

And cigarette warnings are a good example. They have actually been well studied. The first warning that which came out in 1966, said that, "Cigarette smoking may be hazardous to your health," and when smokers were interviewed, they often said, "Well, it says maybe. There is a lot of debate about it. Scientists are not sure."

Q. I just want to interrupt you because I can sense the tension here. Now, we're going to go into the question of the adequacy of the warning, but in terms of the direction of habituation and what it does to a

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[Tr. 51] younger smokers, doing things with their peers, but that's not what is driving them to smoking.

Q. I guess I would ask you the same, to your knowledge, has Philip Morris taken a public position that as the force of the symbolism that gets people to start subsides, the pharmacological effect takes over and that sustains the habit. Are you aware of that?

A. No. As far as I know, Philip Morris and other tobacco companies have really talked about nicotine as being for taste mostly with some mild psychoactivity, but never as sustaining smoking behavior.

MR. COFER: Excuse me. Your Honor, I would object to the portion with respect to other tobacco companies.

THE COURT: Let me use that jurors to remind you the lawsuit is against Philip Morris and not the smoking industry per se. There is going to be evidence you're going to hear about industry issues, and you may consider that as it relates to what Philip Morris knew or did as it acted.

But take care that when any witness talks about the industry, that you draw the [Tr. 52] distinction between the industry and Philip Morris particularly, which is the defendant in this case. Mr. Thomas.

MR. THOMAS: Yes, Judge.

BY MR. THOMAS:

Q. I'd like to go a little forward or closer in time, to 1972. And for the lawyers, that is the Exhibit 84, and I'm just going to show him the highlighted portion.

The 1972 document — again, I have to apologize for the quality, "Philip Morris USA, 1972," a memo from within the company. And I'm going to read it. I am not sure, I want to get it as big as I can without losing something.

"A widely-held theory holds that most people smoke for the narcotic effect, relaxing sedative that comes from the nicotine. The taste comes from the tar particulate in delivery. Although more people talk about taste, it is likely that greater numbers smoke for the narcotic value that comes from the nicotine."

Now in regard to taste and the narcotic effect, to your knowledge, has Philip Morris taken a position in a public forum, recognizing frankly [Tr. 53] that people smoke for the narcotic value that comes from nicotine?

A. No. Philip Morris has stated that the primary importance of nicotine is the taste of cigarettes.

Q. And there is an admission — I'm sorry, that is a legal word. There is a statement in here that the taste actually comes from the tar; is that right?

A. Well, there is some contribution of nicotine, but it is tar and nicotine is the taste.

Q. I'm going to move to Exhibit 86, and this is, again, from confidential document. "Motives and incentives in cigarette smoking." This is the William Dunn we discussed earlier?

A. Yes.

Q. "The majority of the conferees," and this is from a conference that they put together on a lovely little island lying about 150 miles east of the Virgin Islands.

"The majority of the conferees would go even further and accept the proposition that nicotine is the most active constituent of cigarette smoke. Without nicotine, the argument [Tr. 54] goes, there would be no smoking. And point one, no one has ever become a cigarette smoker by smoking cigarettes without nicotine."

Now, what does that have in terms of correlation with your own clinical experience, Doctor, in terms of why it is that people really become smokers?

A. It's what I have been explaining all morning, that the cigarette is a source of nicotine, and that's why people smoke cigarettes, for nicotine effects.

Q. And from the same conference, I'll try to get this as readable as possible. I don't know how well I can do. Follow along with me on that blown-up screen and see if it get it right.

"The cigarette is, in fact, among the most awe-inspiring examples of the ingenuity of man. Let me explain. The cigarette should be conceived, not as a product, but as a package.

The product is nicotine. The cigarette is but one of the many package layers."

Continuing. "Think of the cigarette pack as a storage container for a day's supply of nicotine. Think of the cigarette as a dispenser for a dose unit of nicotine. Think of the puff of

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[Tr. 56] I'd like to move up a little closer to the present and talk about what internal documents show about the concept of optimal cigarette nicotine deliveries. I am going to direct counsels' attention to Exhibit 139, just the highlighted parts. "Interoffice correspondence, Philip Morris USA, November 8, 1990, to C.K. Ellis." Now, do you know of anybody within Philip Morris called C.K. Ellis?

A. Yes. She, I believe, is the a vice-president for research.

Q. In fact, would it be possible that she is involved in world scientific affairs for Philip Morris?

A. I am not sure of her current title, by I do know she was a vice-president for research.

Q. All right. And in regard to a memo to her from three of their people, subject, and I can't say that, can you?

A. I'm not a French speaker, raison d'etre.

Q. And can you just tell us in English what that means, if you know what it means.

A. It's means the reason for being or why they're here.

[Tr. 57] THE COURT REPORTER: Would you spell that for me?

MR. THOMAS: R-a-i-s-o-n-d-'-e-t-r-e.

BY MR. THOMAS: Q. "On November 7th, 1990, you requested that we provide you with information about past,

present and future contributions of electro-physiological studies to PM USA." Now, can you just tell me generally what are electro-physiological studies?

A. Those are the studies involving brain waves that I talked before.

Q. EEG?

A. EEG studies looking at brain activity.

Q. And Paragraph 3 is the one that I am interested in. Quote, "We have shown that there are optimal cigarette nicotine deliveries for producing the most favorable physiological and behavioral responses.

Now, "optimal cigarette nicotine deliveries," what does this show that Philip Morris has apparently established scientifically within the company?

A. The question is, how much nicotine should be in a cigarette? It's clear that cigarettes can [Tr. 58] be manufactured with any amount of nicotine and the amount that a person gets is something that is of interest to manufacturers because they want to make sure there is enough nicotine in the cigarette.

There has been some concern about lower yield cigarettes that people think are less hazardous, but if you know nicotine is what keeps you smoking, you want to make sure there is enough nicotine in the cigarette to keep people smoking cigarettes.

Philip Morris is saying, "What is that level of nicotine that needs to be delivered to a smoker to have that cigarette be satisfying?" And that's really what this question is. It's really a pharmaceutical question. What is the minimal effective dose?

Q. And when we say optimal cigarette nicotine deliveries, optimal, are we talking about optimal nicotine deliveries for the health of a smoker here?

A. No.

Q. What is optimal?

A. We're talking about optimal, balancing out the desire to make cigarettes seem less

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[Tr. 61] A. Right. And delivery is not the same as nicotine content. The content is really, if you were to take all of the tobacco out of the cigarette and extract all the nicotine, how much is there.

Well, in fact, just to give you an example, a typical cigarette contains about, say, 12 to 15 milligrams of nicotine and that's the content. A smoker gets in one milligram and that's the delivery. Content is not decreased by 70 percent.

Q. So the cigarettes that they're selling to Jesse Williams between 1988, and when he died in 1997, in here the nicotine content may have been what it was in the '50s?

A. We don't have those numbers, but it is likely that that nicotine content has changed much, much less than nicotine delivery. It might not have changed at all, but we don't know, because we don't have those old cigarettes.

Q. Okay. And this is nicotine delivery, what comes out of the end?

A. Right.

Q. Is nicotine delivery measured by how much nicotine I could get out of this thing if I smoked [Tr. 62] it, or is it measured by how much is sucked out of the end of it by machine?

A. It is measured in a very standardized Basically, a smoking machine is a cigarette holder that's attached to a syringe that basically draws out smoke.

And it draws out 35 milliliters, which is about a little more than one ounce worth of smoke over exactly two seconds, and then it repeats that every 60 seconds until the cigarette is smoked down to a specified length above the filter over wrap or the paper that overlies the filter.

So that is the standard Federal Trade Commission test. That does not reflect how people smoke. People, in fact, take bigger puffs of them, they take puffs more frequently than every 60 seconds, about every 30 or 35 seconds, and there are also other things that people do when they smoke a cigarette that's different than a machine.

Q. I am going to ask you in a systematic fashion about that. I would like for you to assume that for purposes of nicotine delivery, when Philip Morris says they reduced it by 70 percent that that is correct and that's truthful. [Tr. 63]

We've already talked about what that means in regard to content. Let's talk about what Philip Morris has done in some of their brands to make it so that the nicotine delivery is lower for the smoke machine. Can you tell the jury about that.

A. Yes. There are several things that have been done. One of the things which was done is actually to make the cigarette paper burn faster, so that in given testing, if you puff every 60 seconds, but the paper is smoldering faster, then the smoking machine will take fewer puffs in a standardized test, and that has been shown.

Q. You mean the cigarette paper can be made so that it will burn faster which makes the cigarette burn faster?

A. The machine takes fewer puffs because it can only puff every 60 seconds.

Q. Okay.

A. A person can puff as fast as he or she wants, so a person can compensate for a faster burning cigarette by taking —

Q. More drags?

A. More drags, that's one thing. A second major things that has been — well, there is a [Tr. 64] filter which has an effect on nicotine. And the third thing which — this has been an important thing in the lower yield cigarettes, are ventilation holes.

These are little perforations in the filter, little holes, such that if you draw smoke from the end, like a smoke machine does, and you puff back and you put pressure on it, it will suck in fresh air and it dilutes the smoke.

Q. So that at the nicotine delivery end there is actually less nicotine coming out the end that goes into the smoking machine?

THE COURT: Excuse me.

A JUROR: Would you repeat that about the filter?

BY MR. THOMAS:

Q. Would you repeat that, please? Well, wait, wait, sorry.

THE COURT: That's fine. Don't mind me. It's all right, Mr. Thomas, go ahead.

BY MR. THOMAS:

Q. Okay. Would you repeat that, please.

A. Can I draw it? I think it would be easier if I draw it.

Q. Yes.

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[Vol. 5-A] [Testimony of Neal Benowitz (Feb. 26, 1999)]

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[Tr. 64] A. I have noticed that.

Q. You have noticed that.

On Wednesday, I told this jury that 50 million people in this country, according to The Centers for Disease Control, have quit smoking. And that is correct, sir, isn't that?

A. It's probably pretty close. It's a figure that is changing, and it depends if you're talking living people or all people who have ever smoked who have quit. But I don't contest that number.

Q. Well, the reason I raise it, and again it's a quibble, in your Direct Examination yesterday you said 45 or 50 million; right?

A. Yes.

Q. But a month ago you testified in another tobacco case. It was on — it was in January, January 15th, and it's true you were asked these question and you gave this answer.

"QUESTION: "According to The Centers for Disease Control, there are almost 50 million ex-smokers in this country today?

"ANSWER: "Yes.

"QUESTION: "50 million people who used to smoke and do not smoke?

"ANSWER: [Tr. 65] "Yes.

"QUESTION: "Those are people who have quit for good?

"ANSWER: "Yes.

"QUESTION: "That is about half of everybody who has ever smoked, isn't it?

"ANSWER: "Yes."

That was your sworn testimony, correct, Doctor?

A. Yes.

Q. And, again, I don't want to quibble, but I don't want the jury to think that I just made those 5 million people up. Okay?

A. Well, I would say that 45 million is almost 50 million, which is what I said before.

Q. Actually, a month ago you said 50, but I just want to —

MR. THOMAS: Objection. Misstates the evidence. Request that the quote be reread to the witness.

MR. COFER: Okay. I will.

THE COURT: And, counsel, we don't need to talk with each other regarding objections, please.

MR. COFER: I apologize. And I will [Tr. 66] reread it.

THE COURT: Proceed.

BY MR. COFER:

Q. Let me reread it slowly.

"QUESTION: "There are, according to The Center for Disease Control, there are almost 50 million ex-smokers in this country today?

"ANSWER: "Yes.

"QUESTION: "50 million people who used to smoke do not smoke?

"ANSWER: "Yes.

"QUESTION: "Those are people who have quit for good?

"ANSWER: "Yes.

"QUESTION: "That's about half of everybody who's ever smoked, isn't it.

"ANSWER: "Yes."

A. Well, let me say that I think any reasonable person, once saying almost 50 million people and then the other side comes back and says 50 million people, would not requalify every time. I mean I think that is very nitpicking. And I do not contest the 50 million. Whether it's 45 or 50, whether it's almost 50, I have no problem with it.

Q. Thank you. And I won't spent a lot of [Tr. 67] time on this, but the way they came up with 50 million is that in 1996 The Centers for Disease Control said approximately 46 million people quit; correct?

A. Yes.

Q. And the estimate is that a million and a half people quit every year; right?

A. Yes.

Q. So, if you start in '96 with 46 million some-odd, then you got to '97, you add a million and a half, and you go to '98 and you add a million and a half, you get into part of 2000, that is how you get to the 50 million number; right?

A. Yeah, but how many of those people have died?

Q. These are people — well, okay. The point is we agree on the 50 million; correct?

A. Yes.

Q. All right.

Now, let me tell you something else I told the jury in opening statement about five times, and I want to address these questions with you, Doctor. I told this jury that this case is about Jesse Williams, and so I want to ask you specifically what you know about Jesse Williams.

* * *

[Tr. 88] 25, and ask you if I read that correctly?

A. Yes.

Q. Okay.

And is that your opinion? Is that what the data shows?

A. Yes.

Q. Did you have any information that Mr. Williams was other than the average person?

A. No.

Q. Okay.

Let me show you a time line I used in opening statement. Mr. Williams began smoking in 1950; right?

A. Yes.

Q. Smoked his first Marlboro cigarette in 1955; correct?

A. Yes.

Q. We don't know what he smoked between '50 and '55, do we?

A. I don't.

Q. The average person is addicted within the first two and a half to three years; right?

A. Yes.

Q. You may return to your seat.

THE COURT: Mr. Cofer, at some point

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[Tr. 92] we took the break was you told us that it was your opinion that on average a person who begins smoking at 18, 19, or 20 becomes addicted within year and a half to two years; is that correct, Doctor?

A. I said two to three years.

Q. Two to three years. Thank you for the correction.

And I think you also told the jury that you had no reason to believe Mr. Williams was anything other than an average person; correct?

A. Yes.

Q. So, let me just ask you the question.

Do you have an opinion, to a reasonable degree of medical certainty, whether Mr. Williams was addicted to nicotine cigarettes by 1955?

A. Yes.

Q. What is that opinion?

A. He was.

Q. So, your opinion is that Mr. Williams was already addicted before he ever smoked a Marlboro cigarette; is that correct, Doctor?

A. Yes.

Q. This time line shows that he began in 1955; right?

A. Yes.

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[Vol. 7-A] [Testimony of Richard Pollay (Mar. 2, 1999)]

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[Tr. 92] advertising, early advertising.

First of all, this in regard to what Jesse Williams saw in the '40s, in terms of what kind of an activity cigarette smoking is, what kind of product cigarettes are, what risks or health benefits that cigarettes have or don't have, who smokes, what kind of people smoke, what kind of person he might be if he smoked, would he be under the influence of ads besides Philip Morris' here?

A. Yes. He would have seen a wide variety of advertisements on behalf of cigarettes from a number of manufacturers.

Q. All right. Now, is there a term called cumulative impact?

A. Yes.

Q. Now, tell the jury what the cumulative impact — what does that mean?

A. Well, in the context like this, it would be the way in which our perceptions of the product class is shaped by all of the advertising in that product class. So we come to believe that these products are safe or effective or glamorous or something like that.

And then on top of that, of course, [Tr. 93] individual brands may have particular meanings as being appropriate for women or appropriate for men or the choice of certain occupations or things like that.

So our perceptions of a brand involves both our perceptions of the product in general and our expectations about the product, and then our perceptions about what's unique or special about this product that helps differentiate or separate

it from all of the other products to make it a little bit different.

Q. Does cumulative impact have anything to do with the term that we might be used to cross-pollination? I don't mean technical term, cross-pollination?

A. Well, cross-pollination is not a term I come across in my textbooks. So I'm not sure.

Q. Okay. Well, bad question. Let me withdraw it.

A. Okay.

Q. Is it a part of what you do, teach, that the image associated with a particular activity for one brand may have an impact upon another person's consideration of that activity, regardless of whether it's going to be with that brand or some

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[Tr. 114] Q. And, although I know it's not a very good copy, why don't you come on down here because we are going to go over this. Would you, please, come on down to the podium? Bring that little pointer so you can point some things out, please. Okay. What's the significance of this date? Well, we know the significance.

A. The publication, January 4th, 1954.

Q. Okay. So, it was right after the first of the year?

A. Yes.

Q. And I have got a better copy of it, and I'm going to use that for purposes of this inquiry.

Now, could you just generally — let's before we get to some of the specific promises that they made, could you just tell us generally what is the Frank Statement and how did it come about?

A. The Frank Statement is the opening shot in the industry's battle to restore public confidence in cigarettes and was

published in this kind of very formal way that is all text, no pictures. It is style what we now call an advocacy ad, that is editorializing, another term sometimes used. It's not using pretty pictures or glib advertising phrases, but they writing it in a very [Tr. 115] formal way, almost like a legal document, where you would set out some premise and arguments.

And then, in addition, it has the formality of having all of the signers, that is all of the participants to the organization identified both as organizations and, I believe, as people. That is I think the CEOs or chief, you know, presidents or other executives were identified as the signers of this Frank Statement.

Q. And so here we are with our various signers that are people primarily in the tobacco industry, would that be fair to say?

A. Yes. And the list is a little longer than the list of manufacturers I gave earlier because this also includes people like wholesalers and growers and other people in the tobacco trade, in addition to those people making the finished products.

Q. Okay.

Now, in regard to the Frank Statement itself, was this something that went through a number of different careful edits that were circulated between companies before it came out?

A. Yes. There were a number of drafts. In fact, a number of drafts surviving, and, of course, [Tr. 116] this is the final version that was published.

Q. And I would like to go specifically to some of the items that are contained in here. And this would be the only time that I do this, but I want to do it in connection with the admission of the exhibits and not just in opening statement.

I noted the quality is not so good. Please follow along with me and let me know if I get it right.

First of all, our representations made that distinguished authorities point out a number of items, four different items. One, that medical research of recent years indicates many possible causes of cancer. Now from a public relations standpoint, why would it be that cigarette a manufacturer like Philip Morris might join in paying for an expensive ad where it was pointed out that there is many possible causes of cancer?

A. Well, to take some of the heat off of themselves. That is, the less people have the impression that cigarettes were the only cause of cancer. They wanted to remind people that, among other things, that there were many possible causes. So, they just wanted to spread the blame out.

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[Tr. 118] to do more research, that nobody needs to take any action yet.

Q. Well, let me ask you a question. Through today, March 2, 1999, has Philip Morris continued to claim there's a controversy about the linkage between cigarette smoking and lung cancer?

A. Yes.

Q. And I guess, maybe three is more of the same. There's no proof that cigarette smoking is one of the causes?

A. Yes.

Q. And then, four, the statistics purporting to link cigarette smoking with a disease could apply with equal force to any one of many aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists. Is that right?

A. Yes.

Q. That is correct. Okay.

A. It's correct, that is what they say.

Q. Now, do those observations about the controversy get followed by promising?

A. Yes, they do.

Q. All right.

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[Tr. 85] things like that. Cigarettes has the highest rate of brand loyalty. What that means, most people keep smoking the same brand year after year after year. A very small proportion of people will switch from one brand to another brand in any given year.

Q. And is that consistent with what you found out about what Jesse Williams did as a consumer of cigarettes?

A. Yes. Jesse Williams' smoking history is very characteristic of the smoking history of many, many people. That is, to find a product he liked and smoke it and trust that it was a good product for him.

Q. Is it the cleverness of the advertising, from your perspective as a marketing expert, advertising expert, is it some special magic in their mix of their marketing that accounts for how it is that the brand loyalty is so high from this product?

A. I think it is both the nature of the product. That is, because it produces a very pronounced physiological satisfaction, that itself is a strong reinforcer, so people go back to whatever has been reinforced. And then the [Tr. 86] advertising works on top of that to offer continued reassurances, and through repetition create favorable impression that lots of other people are doing the same thing, it is okay. "This is a well-known, highly popular product," so on. So I'm not sure if that answers your question.

Q. It does.

A. It is a little difficult, in my mind, to separate out kind of the effect of the product and its capacity to deliver nicotine and nicotine satisfaction and the advertising and its capacity to offer repetition of the promise and the glamour and all of that stuff.

Q. What I would like to do for the next question is to separate what I mean by the question from what I don't mean.

First I will start out with what I don't mean. I don't mean to imply that Jesse Williams' free will was taken away from him by cigarette advertising, or that he is not responsible. But what I do mean is, was Jesse Williams a — I would like you to assume for purposes of this question that he was a highly habituated smoker, or [Tr. 87] addicted smoker, somebody from a marketing perspective who would be more likely to have brand loyalty and continue to smoke and be receptive to the Marlboro message than somebody who didn't have such a high level of habituation or addiction?

A. He would be more likely to be receptive than someone who wasn't habituated — who wasn't addicted or habituated.

Q. Because of the timing, I'm feeling pressed, because I want to finish with you by 5:00, so I'm just going to give you a leading question to get into a story. Are you familiar with an article that was written by Leo Burnett called Communications of An Advertising Man?

A. That title is actually the title of a compilation of his writings put together as a book, and it includes several articles. I'm familiar with the book as a whole, and several of the articles I have seen on a repeated basis.

Q. Again, is Leo Burnett the person who was sort of the mastermind of the Marlboro man and the cowboy?

A. He was.

Q. And did he come up with the term called

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* * *

[Tr. 32] smoking, do you?

A. That's correct.

Q. When he started smoking, you don't know what his attitudes were towards smoking, do you?

A. I only know that it's reported that he was encouraged to smoke as a mosquito-control in the Korean situation.

Q. He was told by fellow GIs that if you want to keep the mosquitoes off you, you smoke and it will keep them away; right?

A. That's correct.

Q. You know of no other reasons why he started to smoke?

A. That's correct.

Q. You don't know what his personal perception of advertising was at that time, do you?

A. That's correct.

Q. Don't know what his views in general were about advertising, do you?

A. That's correct.

Q. You don't know if he was a cynical person about advertising?

A. That's correct.

Q. Other than the photos we saw yesterday of billboards and convenience stores in Portland —

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[Vol. 8-C] [Testimony of Richard Pollay (Mar. 3, 1999)]

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[Tr. 12].

Q. Let's talk about the 1964 Surgeon General's Report. Now, you are aware that the results of the of 1964 Surgeon General's Report received widespread publicity, right?

A. Yes. There were a couple of days when it was in the headlines.

Q. Would you disagree with the 1989 report of the United States Surgeon General, "For several days the 1964 report furnished newspaper headlines across the country and lead stories on television broadcasts." Would you disagree with that assessment?

A. Well, I might qualify it. I'm not sure what they meant by "several." It would seem there were a couple of days, but there might have been follow-up stories. May depend on what is meant by "lead headlines." Certainly was prominent for a while. It was released on a Saturday and was released that Sunday and the first part of the following week.

Q. You are not trying to suggest to the jury that it wasn't a big story in 1964, are you?

A. It was a big story for a short while, that's what I am suggesting. It wasn't a big story compared to the civil rights issues that

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[Tr. 20] read.

Q. Are you aware that the Gallup Polling organization did a poll in June of 1954 and reported that 89.9 percent of the American public had heard that smoking may cause lung cancer?

A. Yes, and I'm aware as well that they have recently published a paper objecting to your use of the misuse of that information. They carefully point out that even more people were aware of flying saucers and men from Mars, and the facts are more germane is that only 7 percent of people would identify cancer when given an open-ended question.

Q. Let's return to my original question. I understand your qualifiers, but you are aware that the Gallup Poll did a poll in June of 1954 and reported that 89.9 percent of the American public had heard of smoking may cause lung cancer; that's a correct statement?

A. That's correct. And, of course, the corresponding data would be that 10 percent had not heard of it.

Q. Let's go through that few more. Are you aware in 1964 a U.S. government survey found that 81 percent of all adults agree, not just heard, [Tr. 21] but agreed that cigarette smoking is harmful to health?

A. Yes. The issue there is — of course, is what the harm that is in people's minds; they are talking about sore throats and coughs, or are they aware of fatal consequences like various cancers.

Q. And 1964 was the year that the Surgeon General put out his report saying that cigarette smoking caused lung cancer in men, right?

A. Yes.

Q. In fact, didn't the United States Surgeon General say in 1979 that smoker are almost uniformly aware of the health risks of smoking?

A. By 1979 I think that's true, that the majority of people were aware that there were some risks.

Again, the issue is what risks they were aware of. And in these periods of time people attribute other things, like getting in and out of bath tubs, to be even riskier.

Q. Okay. Let's talk about lung cancer. Are you aware that, according to 1989 Surgeon General's Report, that about 90 percent of all adults agree smoking causes lung cancer?

A. 1989?

[Tr. 22] Q. 1989.

A. Yes, that evolved quite a bit over those 35 years.

Q. And you agree that the ordinary consumer today is aware that one of the risks associated with smoking is lung cancer, right?

A. Yes, despite the industry's denials of that, yes.

Q. Let's talk about the Federal Trade Commission. Now, the Federal Trade Commission is responsible for government oversight of advertising, including cigarette advertising, right?

A. Yes.

Q. The Federal Trade Commission has regulated cigarette advertising for decades, right?

A. Yes. They first attempted to do so in the late '30s and '40s.

Q. And the FTC requires cigarette companies to submit massive reports every year on their advertising, doesn't it.

A. They are not massive. The reports the FTC publishes is a matter of a few pages.

Q. The report the FTC publishes. You are

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[Tr. 38] January of 1964.

Q. All right. What I'm going to do is to show you two — excuse me, two stories. One is dated Saturday, January the 11th. And these are old copies of old pieces of paper, but let's get the first here.

January 11, 1964. "New tobacco report designed to go beyond peril to lungs." And in terms of the response by the Tobacco Institute, I'm going to read this, and tell me if I get it right:

"The tobacco industry claims, however, that a causative connection between smoking and impaired health has not been proved. In a detailed report released Thursday" — so that would have been — if it was released Thursday, did it actually — they preempted the release of the Surgeon General's —

A. That's exactly what it is called. A presumptive strike to preempt the headlines and diffuse the news coverage on subsequent days.

Q. "At Greensboro, North Carolina, the nation's tobacco claim that a vast majority of smokers suffered no serious impairments of health or shortening of life. The Tobacco Institute,[Tr. 39] Inc., representing manufacturers," and then it kind of turns into an unreadable section.

But would it be fair to say that the tobacco industry was effective in getting its view contained even within the report about the Surgeon General's release?

A. Yes. On this and even in subsequent days, as well.

Q. That was Saturday, January 11. Now we will go forward to January the 12th, Sunday. The Sunday Oregonian. Sunday, January the 12th. And then we have got, "The report links the cigarette use with cancer," and go down to the verse mentioned — again, I will read it. "It is more prudent to assume that the established association between cigarette smoking and coronary disease has a causative meaning than to suspend judgment until no uncertainty remains."

I'm going to represent to you that that is the view that was taken in the Surgeon General's Report.

Now, in terms of this — I guess the content of this position, would it be fair to say that what this Surgeon General's Report is urging is that rather than holding off while — until the

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[Tr. 131] mutagen as being a bullet shot towards the person. And let's say you're shooting, you know, 100,000 bullets, but they are far away. You might not really hit them. We can reduce that to 90,000. Then down to a 10,000. And then down to 5,000. You reduce the probability you are going to hit them. So that is the general philosophy of the safety research. It's to try and reduce the number of mutagens or probability of attack of that cell.

Q. When you were being recruited to go work for Philip Morris, did anybody suggest to you in that process that there was an unfair accusation being made against cigarettes as the cause of lung cancer?

A. No.

Q. When you were being oriented to the work that you were to do at Philip Morris by meeting with the other scientists and talking with them about various projects, did anybody ever suggest to you that there was a controversy about whether or not lung cancer was caused by smoking cigarettes?

A. Well, the issue of controversy came up. Dr. Osdene explained to me that one of his job functions was to maintain the controversy, was to fuel the controversy. I mean, there was no people [Tr. 132] within the organization weren't — I mean, in order to solve this problem, you have to recognize the problem, take steps to solve the problem. So, the people that were working on the problem understood the mechanisms that I just described, and they were working to try and reduce that.

By the same token, Dr. Osdene expressed the concept that part of his job was to attack outside reports of links between smoking and cancer or smoking and emphysema or

things of that sort by maintaining that there's a controversy and providing the information that would discredit or somehow cast down on the outside research.

Q. Was that subject with Dr. Osdene something that came up in conversation from time to time throughout your career there?

A. Yes. We had many discussions and arguments, if you will, concerning that.

Q. And we may see when we get into these documents a little more — some examples of it, but did Dr. Osdene express sometimes frustration and difficulty at the task of maintaining that there was controversy about these subjects?

A. Well, I think, you know, for Dr. Osdene it was an uncomfortable position to be in. And, I [Tr. 133] mean, Dr. Osdene was trying at the same time to work with us to develop safer products. So, it's sort of — it's a difficult position Dr. Osdene was in, a very difficult position, because at the same time he's trying to help the people within the research and development division develop a safer product, and on the other hand he's trying to come up with reasons why other people who might purport to discuss things about smoking and disease are incorrect. So, it's kind of a very tough position to be in.

Q. During your orientation to Philip Morris' business, did you also review documents available to you that went back in history before your contact with the company?

A. Yes. For every project that I reviewed, I went into the library. We had an extensive central file system. And in talking with people, I would ask them for documents. It's a typical scientific method to try and get as much information about past research done there as possible.

Q. And within the internal documents of Philip Morris, did you also find references to the acknowledgement of smoking cigarettes as a [Tr. 134] carcinogenic thing to do?

A. Yes. Well, carcinogenic — and, you know, because sometimes it's not nice to see things like this used in those words. You'll find that this summation of these three things referred to in a lot of reports as biological activity. It is also used when you don't want to be specific about what you are talking about. Caused a bad change. And/or this could be called biological effect.

But if you looked at the study and you went and talked with a person, you could usually determine which of the things we were talking about here.

There's another, just plain toxicity, because a lot of the compounds are just plain toxic.

MR. COFER: We can't see that on the monitor.

MR. GAYLORD: You want to move that over to your right.

MR. COFER: A little more.

MR. GAYLORD: To the right. Right.

BY MR. GAYLORD:

Q. Biological activity then, would it be fair to call it a euphemism that was used in the [Tr. 135] company to describe, without using words like carcinogen?

A. Yes. And if you read the reports you'll see it referred to a lot.

Q. Okay. Now, I just wanted to show you one example and ask you if this is — again this is an exhibit in evidence, Plaintiff's Exhibit 53, a Philip Morris document, dated March 25, 1964. It's large enough to read. Entitled 1965 Cigarette Program Objectives and Approaches. And is this a document you have some familiarity with?

A. Yes. I'm going to skip over to the topic of nicotine delivery on here just for moment, and we'll probably come back to that.

But with respect to what you learned at Philip Morris and your orientation about the relationship between smoking and lung cancer, Item 4 says: "The product design should include consideration of chemical carcinogens within the following framework." Is that one reference to an acknowledgement by Philip Morris that the cigarette products contained cancer-causing chemicals?

A. Yes.

Q. And were there many others?

[Tr. 136] A. Any others?

Q. Were there many other references?

A. Oh, yes, many others.

Q. Okay. Now, let's turn to a similar series of questions but different topics.

In your orientation to the cigarette business as a new employee at Philip Morris and your opportunity to converse with other scientists and work your way through the business — by the way, let me back that up.

Was that was just something you did on your own or was that a specific assignment that you received?

A. It was an assignment.

Q. You were instructed to familiarize yourself with the whole business?

A. Correct. It was a good idea. It was also an assignment.

Q. When you say the whole business, it wasn't just science going on and the science part but the manufacturing businesses?

A. That's correct. Special effort was made to make sure I even went out with, for example, the leaf purchasing team to buy tobacco. And, you know, out in the field. I went to the farms. [Tr. 137] Philip Morris doesn't grow tobacco, but — not in the United State's, but they buy it off the open market, but we had to understand how it was raised so we had actually to visit farms, and in our research we actually did work on growing tobacco on the farms. So all of that, right from the place where they grew it, to the place where they processed it, all the way through the entire process.

Q. Dr. Farone, before I leave the subject of cancer and the understandings and expressions of that subject, as you became oriented to the business, let me ask one question about that.

Did you ever run into anybody, in your orientation to the business of Philip Morris, any scientists, any manager, did anybody ever tell you that cigarettes smoking did not cause cancer?

A. No. And in talking with them — the science doesn't really work that way. You have a hypothesis. And your cumulative evidence which leads you to a hypothesis. The hypothesis is that smoking causes cancer by the mechanism I just described. In order to refute that, my hypothesis, you have to present evidence to the contrary

So I never heard anyone that they had [Tr. 138] evidence to the contrary.

What you would hear occasionally was that well so and so had published a paper and that paper wasn't done very well.

So, that doesn't provide additional evidence for the hypothesis. That is the nature of the so-called controversy. This controversy is attacking other people's support of the hypothesis. But I never heard anyone at Philip Morris say that they had any evidence to refute that hypothesis at no time.

Q. All right.

Now, I want to move to the subject of nicotine and addiction, and, again, ask you what you learned, what people brought to your attention, what became your understanding from your orientation about the internal knowledge of Philip Morris about the addictiveness of nicotine.

A. Well, the operating hypothesis was, even before I went there, it was never denied, is that people smoke for nicotine. That is the reason. Other alkaloids in tobacco. There are some other ones, may have some minor effects. There are some other things, but basically it's nicotine.

There was — I went there with the [Tr. 139] knowledge, for example, in the 1950's. There was a product on the market called Sano cigarettes, and it was King Sano. That was a denicotinized cigarette. And unlike decaffeinated colas, which captured the market, those products never made it. So, there was a general conclusion that was accepted that people smoked for nicotine.

And in addition, when I went, Philip Morris was in the process of introducing the Merit cigarette, which is the mid-'70s, when the low-tar category really came into being. And there was a recognition if you reduce the nicotine too far people might not smoke their product. On the other hand, the nicotine itself as far as was known was not — was toxic, but not mutagenic, and it's not carcinogenic.

So, what was being done there and throughout the industry was to maintain the level of nicotine to the smoker while reducing the tar.

So, while in general the nicotine was being reduced, it was not being reduced as much as the tar was being reduced.

So, everything was focused on the maintaining nicotine in smoke. I know — I think I want to go through [Tr. 140]

and not be too tedious about it, a series of documents, and with respect to the nicotine question.

Did you acquire knowledge from a great many documents that were in the files and archives of Philip Morris as part of your orientation about this subject of the relationship between nicotine and the reasons why people smoke, about the addictive quality of nicotine, habit forming, dependent forming, chemical-dependence forming qualities?

For example, Plaintiffs Exhibit 36, I'll set that aside and come back in a moment. Plaintiffs Exhibit 36 is dated August 3, '69, '59 — it's a lousy old copy, and it contains the question — this is from or to a Dr. Dupris in psychological research: Why do people smoke? And it goes on in several parts. But item 3, 1959, is addiction. Is that one of the documents that you are familiar with?

A. Yes.

Q. Is that part of the basis for your saying that that was an established understanding of Philip Morris?

A. Correct. There are many documents.

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[Tr. 146] less effect." And Item 5: "Thus a new healthy cigarette entry could not rely on increased demands for health cigarettes but would have to take its place at the expense of existing brands of health cigarettes." Was it part of the understanding that you gained from your fellow employees at Philip Morris that it was known that the health concerns about cigarettes were more effective in preventing people from starting smoking than from in persuading them to quit smoking?

A. Well, actually not really, by the time I got there. This is an earlier document. But the interesting thing about the document, if you could put it back there for a minute.

Q. Okay. I have got more about it, too?

A. It talks about less effect on the demand for health cigarettes. So, you might — I asked the question well, what are we talking about? What's health cigarettes? The answer is that when they first put a filter on a cigarette that was viewed by the industry as being a health cigarette. In other words, it was an implied health claim because the filter obviously is going to help you [Tr. 147] get rid of some of the bad stuff. That's what's being referred to in the first health scare in the '50s. '50s where the advent of the filtered cigarette. And then the '70s, which comes after this document, the low tar era.

There's another thing in between which is also considered a health cigarette, and is that the addition of menthol. Menthol was viewed as being — you know, menthol is used for ease in coughing. Menthol is in cough drops and things like that. So, if you have trouble with your throat, and things like that you put menthol in a cigarette, obviously, it's going to help you.

So when I first heard about this stuff I was interested in what that meant.

Q. When you said obviously that is going to help, are you saying that it really was going to help or are you saying that was an approach?

A. That was an approach. I didn't see any. I didn't have any data, nor would I have seen any data at Philip Morris that would imply or show that a menthol cigarette was less carcinogenic or less toxic than a regular cigarette.

Q. Was the concept of a health cigarette as you have just defined it something that was used at [Tr. 148] Philip Morris as a kind of an implied representation about products to the effect that consumers would take them as more healthy?

A. The whole industry, actually. It's not a Philip Morris thing. It's just those are categories within the industry that

came about because of the perception that those things would be somehow safer.

Q. Okay. We'll probably get to some other documents that talk about perception of filtration being what mattered. On this page, Page 5, Exhibit 59, was Mr. Johnson's statement, quote, "A cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation and would, therefore, almost certainly fail." Was that notion one of the sources and consistent with the information you received about the company's awareness of the addictiveness of nicotine?

A. Yes.

Q. And it's an essential role in the ability to continue to sell cigarettes?

A. Yes.

Q. I'm going to try move a little more

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[Vol. 9-B] [Testimony of William Farone (Mar. 4, 1999)]

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[Tr. 31] in order to compensate for that nicotine and in order for them not to get as much carcinogen as possible, the change in nicotine/tar ratio reduces relatively the amount of tar.

Q. Okay. If you are going to continue to make and sell a product that is addictive with nicotine, then would you say it is a good thing, in light of that, to reduce the amount of tar and carcinogens that you supply along with the nicotine?

A. That was the premise, yes.

Q. You mentioned compensation, and the jury has heard about that from other witnesses. I want to ask you, is the concept of smokers changing their habits to compensate and get more nicotine from a lower nicotine cigarette something that was understood at Philip Morris when you were there?

A. More than understood. We developed special techniques for measuring it, and we tested products in terms of delivery, as I mentioned, using a device called the human smoke simulator, where you had machines smoke the way you could collect data off of people so you could, in fact, engineer the cigarette by making changes in these different properties to deliver acceptable levels [Tr. 32] of nicotine.

Q. The human smoke simulator is not the same thing as the FTC machine?

A. No, it is a similar kind of machine. But the FTC machine — see if I can remember all this. We used about 30 milliliters, 30cc puffs, and we did it maybe nine or ten times, seven to eight times, depending on the length of the cigarette.

Length is an important factor, regular versus 100s, 85 millimeters versus a hundred millimeters versus 120 millimeters. Those are the three lengths out there. So normally

you might take a puff of — so many every 30 seconds. It turns out some people might take a puff every 60 seconds. They would take — 60 milliliters. One-second puffs or two-second puffs. They double the — I misspoke. I confused that. It is 30 milliliters in the FTC test, 60 to 70 milliliters in the human smoking. It's maybe one-second puffs versus two-second puffs. All those things change between the machine and the human.

Q. Let me move into some more specifics now.

In view of the understanding that we have about the things that were — the goals of making these changes, tell us about some of the things, I

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[Tr. 58] look for carbon monoxide and other chemicals very, very quickly by this technique. It was an infrared technique. You passed a beam of infrared light through the gas out the back of the cigarette, you could instantaneous, almost a matter of milliseconds, determine the chemistry. We started analyzing our own products that way.

We started to analyze competitive products that way, and we used that for a while. In about 1980 or so, we determined that the competition, specifically R.J. Reynolds and the Winston brand had started to put ammonium compounds in their product.

The way we learned that, we saw the burst of ammonia go way up and we saw the increase of gas phase nicotine. And so that led us to go look at the analysis of the tobacco and made the determination that R.J. Reynolds was starting to add ammonium compounds to their products to make the subjective response of that product more like a Marlboro.

Q. We have heard about the tar derby or the tar wars. Was this something that could be characterized as the ammonia wars?

A. Well, there was considerable concern that [Tr. 59] if, in fact, the success of the Marlboro brand was dependent upon the relevant amount of ammonia compared to other brands, that now everyone would start putting ammonia in and that there would be an increase in saleability, shall we say, or acceptability of the competing products.

Q. Now, just a couple of reminders. I'm not going to take the trouble to show them again; they have been seen several times.

Exhibit 58 is a March 31, 1966 report on nicotine and smoke pH from the Philip Morris documents that we have, and it has a statement, "Nicotine delivery can be controlled via filler or smoke pH adjustment." And the jury has seen that several times.

Q. Is that a statement of the phenomena you have been describing?

A. It is related to the phenomena. As I said before, when the ammonia gas strikes the wet filler, it will drive up the pH or basicity of the filler, driving up the nicotine. Then if that were to further decompose, you would also see an increase in the smoke pH. But it isn't necessary for the smoke pH to go out to deliver more nicotine by sweeping ammonia gas through the wet [Tr. 60] filler. Usually does, but it isn't necessary.

Q. Exhibit 92 is another document that the jury has seen. Let me remind myself the date before I refer to it, which is the Schori Behavioral Research Laboratory report of October 1974, smoke impact from a psychologist's vantage point.

"Suggesting that smoke impact is due to nicotine, however, is nothing new. The important factor, though, is not the amount of nicotine in the smoke per se but rather it is the amount of free nicotine in the smoke, which determines the degree of smoke impact."

I want to relate that phrase "free nicotine" to what you have been telling us about ammonia.

A. The term "free nicotine" means a freebase, which is — or unprotonated, the kind in the gas phase. It can also be a small portion of the nicotine that is in the particulate phase.

Q. Another document is Exhibit 142, I think you have some familiarity with. I will tell you it is a February 5th, 1992 Philip Morris document from Dr. Gullotta — is it Gullotta (enunciating), is that how it's pronounced?

[Tr. 61] A. Yes.

Q. In which he outlines the 1991 accomplishments and includes this statement, that they, quote, demonstrated that systematic relationship between increases in filler pH and increases in gas phase presumably unprotonated nicotine, close quote.

First off, was that a new concept or demonstration in 1991, to your knowledge?

A. No, that's a continuation of the same hypothesis, or same rationale.

Q. And in the next item on that same report in 1991 Dr. Gullotta wrote, quote, demonstrated that the addition of basis to cigarettes. That's this freebase, one of the ways to do it would be the ammonia?

A. Yes.

Q. "The addition of basis to cigarettes enhances subjective and electrophysiological responses." Is that a finding consistent with what you have told us about was being done and known while you were at Philip Morris?

A. Yes, it is.

Q. And is that enhancement of subjective and electrophysiological responses another way of [Tr. 62] characteriz-

ing the goal of impacting the smoker by adding ammonia to the cigarette?

MR. COFER: Objection, leading.

THE COURT: Overruled. Go ahead.

THE WITNESS: Yes, it is.

BY MR. GAYLORD:

Q. Now, I want to ask you to share with the jury just some examples of other things. You told us there is 57. We are not going to go down the list at all. But there are one or two other significant parts of the — significant examples of the choices of things that could be manipulated in the Marlboro that were part of your knowledge and part of your work at Philip Morris that were used for purposes of enhancing smoker impac by nicotine.

A. Okay. When we talk about Marlboro, we have to understand that there is a variety of Marlboros. There is Marlboro Regular, Marlboro King, Marlboro Light, Marlboro Menthol, and so there are slight differences in the composition of all of those products. There is no single Marlboro.

But, in general, if you change the paper porosity, the place were the ventilation filters

* * *

[Tr. 64] there, anyway, they went back as far as five years.

The reason for that is that the alkaloid content. That's nicotine, nornicotine, or things like sugar and other contents change from season, from year-to-year, and also among the grades that they can go out and buy. So you have a lot of latitude in terms of manipulating the product simply by how you blend the different years, how you blend the different tobaccos together.

Q. Let me ask you now a somewhat more pointed question about the question of manipulation. We told the jury in

the beginning of the case that there was something about sugar that was one of the things known and understood and used for purposes of enhancing the nicotine effect of cigarettes at Philip Morris. Is that a starting point for a story you can tell us?

A. Well, yes. First thing we have to realize is that before you talk about manipulation, you talk about discovery. In other words, you have to have some finding that leads you to something that is usable.

In this particular case, I characterize [Tr. 65] it more as a finding than — it starts off and, look, why do we see certain effects with certain products where the nicotine seems to be giving more of an effect? One of the determinations that was made at least within some rat studies going on, one of the degradation products of sugar, it is not only from sugar, but primarily it can come from sugar and tobacco, a compound called acetaldehyde.

Q. I'm going to have you write that one down for us, if you wouldn't mind.

A. Sure. (Witness complies.)

Acetaldehyde is important for several respects. First of all, it is a carcinogen. Second of all, it is one of those things that if you were to ingest it, it gets turned into acetic acid, like vinegar, relatively harmless.

If you inhale it, acetaldehyde is not good. It is related to formaldehyde for preserving specimens. This is a decomposition byproduct of sugar. One of the scientists, Dr. DeNoble, found there would be an interaction between acetaldehyde and nicotine which opened up the thought process, if you will, that there are many compounds that are in smoke that enhance the [Tr. 66] effect of nicotine.

The research laboratory I think I mentioned earlier had been working on nicotine analogs. Those are chemical com-

pounds that kind of collect nicotine, but they are different. The reason for that, nicotine has an unfortunate side effect of changing your heart rate, increasing it. It is linked to some cardiovascular problems. It has two effects, one on your central nervous system and one on the peripheral nervous system. If you could eliminate the bad effects and keep the good ones, that would probably make a safer material. So we were looking at those compounds.

Sugar played a role in both things. First of all, sugar, as we say, provides acetaldehyde, which maybe could increase the effects of nicotine. The other thing, if you mix sugar with protein or amino acids and cook it, Philip Morris called those cooked flavors, and you put those in a cigarette, you would create a class of compounds called pyridines and pyrazines. Pyridines, the simplist nicotine analogs are pyridine compounds. Pyridine itself is a simplest analog of nicotine.

Sugar was implicated in two ways; one in [Tr. 67] acetaldehyde and this cooked flavor, where the objective was to add things to a cigarette that would enhance the effect of nicotine.

Q. Now, you mentioned Dr. DeNoble, and Dr. DeNoble is one of your colleagues at the research center of Philip Morris?

A. Yes. He didn't work for me. He worked in Dr. Dunn's group under Dr. Osdene.

Q. That was the group you told us about earlier that did the testing to implement things that your group might have come up for possibly improved safety of products?

A. That's correct.

Q. And did Dr. DeNoble have a specialty of testing animals, rats in particular?

A. His specialty, he had a laboratory where he used rats as a medium for testing the effects of nicotine, yes.

Q. And in the process of rat testing did he discover that there was an enhancing effect of the nicotine on rats when acetaldehyde, an increased component of the smoke —

MR. COFER: Objection leading.

THE COURT: It is leading, Mr. Gaylord.

MR. GAYLORD: I will rephrase.

[Tr. 68] BY MR. GAYLORD:

Q. What can you tell us about Dr. DeNoble's discoveries, if any, about acetaldehyde and its relationship to the effect of nicotine on rats?

A. Dr. DeNoble was primarily studying the nicotine analogs that I mentioned that were being synthesized by Dr. Jeffery Seeman and his coworkers. And, in addition to that, he decided to study other chemicals that might interact with nicotine that were present in smoke in relatively high amounts. So acetaldehyde was one of the compounds that he selected for study, and he found that it had, in this rat test, a reinforcing effect on nicotine in rats.

Q. Were adjustments of the amounts of sugar for purposes of determining — for purposes of having an effect on the impact of nicotine to smokers made in Philip Morris cigarettes?

A. I don't know.

Q. Were adjustments to the — what you called cooked flavors made in the cigarette products that would affect the nicotine impact on smokers?

A. Yes.

Q. And the — let me ask you this: If we [Tr. 69] could go to the manufacturing plant where they made Marlboros for Philip Morris and walk through the plant and look at the various vats and pipes and things that are used in manufacturing at Philip Morris, would we see steps in the process that

included adding ammonia to the material that was going to go into the Marlboro?

A. Yes.

Q. And tanks labeled "ammonia" and pipes going into the other vats and pipes to do that?

A. You would see ammonia, urea, diammonium phosphate. You would see a lot different chemicals. Propylene glycol, glycerin. There are a lot of chemicals I've mentioned. The chemicals comprise about 20 percent of the weight of everything that is inside the rod, the tobacco part.

Q. I didn't ask you this earlier. In the process of manufacturing the cigarettes, is the nicotine just left alone, or is it in itself manipulated?

A. Nicotine comes in with the tobacco they buy. They buy the tobacco and then they analyze it before they put it in storage. I mentioned they take it out of storage sometimes over five [Tr. 70] years, three years to five years. So we know where all the nicotine is, and then depending on how much nicotine you want for a specific product, you can select between the various amounts.

One of the misconceptions, I think, is that manipulation involves adding extra nicotine. You don't need to do that at all. All you need to do is jiggle it from one place to the other to where you want.

So, for example, in the '70s, when I got there, Merit cigarette, they increased the amount of high alkaloid or high nicotine tobacco that was used in that specific product to change the nicotine/tar ratio. So even though you are not buying nicotine from a nicotine store and putting it into cigarettes, you are changing which products it is in and how much by how you manipulate your warehouses full of nicotine and tobacco products.

Q. Is the nicotine that results, the level or amount of nicotine that results in a Marlboro an accident?

A. No, nothing in those products is an accident. I mentioned that they blend over crop years. Approximately every quarter you have to [Tr. 71] change the blend formula. It is very carefully engineered. Everything is very careful and controlled.

To give you an example, when you run a tar/nicotine test, the test prescribes that you go out and take like certain number of cigarettes, let's say 200, or packages. There is a protocol for doing that. If you didn't regulate things very carefully, what would happen is you would have a very wide error in — you smoke one cigarette and have lots, and the next one would have a little bit.

The industry, over the last 50 years, has moved to being able to make a very, very consistent product in both tar delivery and nicotine delivery. In order to do that, you have to manipulate and control the product almost totally.

Q. If we told the jury that they essentially take out the nicotine and put it back in measured amounts, is that concept reasonably accurate?

A. In certain respects, if you talk about this sheet-making process that I was talking about. If you make it out of the paper sheet, what you are doing is you put fiber down. Fiber

* * *

[Tr. 79] those projects were.

Q. Were you and the people working under you and the people working in the other directorates that you were aware of able to successfully bring into the marketplace substantial improvements in the safety of Philip Morris cigarettes?

A. We don't know. The predominant evidence, the answer is no.

Q. Were you aware of programs that were undertaken and pursued but stopped short of completion by policies at Philip Morris?

A. Yes.

Q. Can you describe at least some examples of that phenomena?

A. Yes. One example is you mentioned earlier the negative effects of nitrate in tobacco. When I arrived at Philip Morris, there was two — there was an ongoing method at the plant where they made this paper sheet. They could remove about 90 percent of the nitrate that was in the tobacco, because at that point you are taking the tobacco waste apart. You are making fiber, and you have what we call the soluble part.

So you could cool down the soluble part and you would proceed to take out little crystals

* * *

[Tr. 87] A. Yes, he was.

Q. I want to change directions with respect to a subject that you have mentioned a couple of times, and you have said that there were secret or off-limit areas of research.

Let me ask you — let me introduce the subject this way: You are familiar with the term "gentlemen's agreement" in the context of the tobacco business?

A. Yes, I am.

Q. Did you come to know that there was a — by whatever name, a gentlemen's agreement between different members of the tobacco industry about what kinds of testing and development would and would not be undertaken by the companies?

A. Yes, I did.

Q. Was that something that you came to learn about because in your department's research work it sometimes frustrated your efforts?

A. Well, we — in my opinion, this made sense. We supposedly were making safer products. In order to determine whether or not the products are safer, you have to test the product, the final product. You can't test some surrogate for the product.

[Tr. 88] If you want to know, for example, whether Merit cigarette, which is a low tar cigarette, is safer than Marlboro cigarette, you have to test Merit versus Marlboro. And I couldn't find, while I was there, much evidence that was being done.

So my conversations with Dr. Osdene, Dr. Seligman, later Dr. Hausermann, who was my boss, Dr. Wakeham, Mr. Resnick centered around, well, this type of testing and how are we going to do this type of testing? And we were told — I was told by all those people that we can't do that kind of testing, because we have agreed among the cigarette companies not to test animal tests products, and we agreed in the United States and we agreed to not final test the products.

I said, "How are we going to find out?" I was told that type of testing was being done in Europe primarily at a place called INBIFO, I-N-B-I-F-O, and that Dr. Osdene was coordinating that testing at INBIFO. I was told by my boss that either Dr. Seligman in the beginning, or later Dr. Hausermann, that the way I could find out about the results of that testing was by consulting with Dr. Osdene.

Q. Let me see if I understand the [Tr. 89] development of this part of your knowledge. You came to work at Philip Morris and you were instructed to orient yourself to the business and learn what you could about how things were done?

A. Correct.

Q. And you did that. Did anybody give you at any point that document that either was called the gentlemen's agreement or contained the gentlemen's agreement?

A. No.

Q. Did you ever see a document that said, "We have got a deal and here is the gentlemen's agreement and we're not going to do certain things"?

A. While I was there?

Q. Yes.

A. Not while I was there.

Q. Over time did you develop an understanding that there were limits to what you and other researchers could do, based on an agreement between Philip Morris and the other manufacturers?

A. As I indicated, I was told that by Dr. Osdene, Dr. Seligman, Dr. Hausermann,

[Tr. 90] Dr. Helmut Gaisch, Dr. Osdene's counterpart in Europe. Dr. Wakeham. Just numerous people, because as you worked at a place longer and longer, you developed more and more information, and that's — I knew about it.

Q. Was this something you learned about by asking about particular tests that you thought should be done and finding out on more than one occasion that there was some reason you couldn't?

A. Let's choose a specific example. It is easier for me.

We made this denitrified RL sheet. The sheet alone, when you tested it, looked like it had no nitrosamine in it. The question is, how big an effect would that have if you used that sheet in the Marlboro cigarette? In order to know that, you would have to incorporate that into a Marlboro cigarette and test the current Marlboro cigarette versus that in

biological tests, in vitro and in vivo biological tests, to determine whether or not it was safe.

That's what we were trying to get done, so we would know. The way that supposedly was going to work was that Dr. Osdene would take care of those kinds of testing and then we would be [Tr. 91] told of the final results.

Q. Now, you said you wanted to test that in a Marlboro cigarette. I'm going to surmise that if you put that in there you wouldn't call it a Marlboro at that point.

A. No. Changes are being made every three months. Changing the blend components we talked about. If you put that in there, you could still call it a Marlboro. But the thing is, you want to put it in a product that is being tested; Marlboro, current Marlboro versus modified Marlboro, and new Marlboro. You can still do that. But the main issue is to test the product, the final product that you are going to sell.

Q. Is there is a concept called whole product testing?

A. Concept in almost every consumer product I'm aware of.

Q. Has that concept in your career, excluding Philip Morris, been an essential step in determining whether there are any unforeseen harms to come from a product before it is put on a marketing —

MR. COFER: Objection, leading.

THE COURT: Overruled.

[Tr. 92] THE WITNESS: Whole product testing, in my opinion, in every industry I have worked in outside of Philip Morris is a requirement. You want to test the product that you sell, particularly for a consumer product. It is a product the consumer uses or comes in contact with, and you need to anticipate all of the problems that you can anticipate for that problem and you need to study them.

BY MR. GAYLORD:

Q. From your experience at Lever Brothers, for example, had you ever encountered a situation where there were restrictions or limitations against performing tests on the final product before it was sold?

A. No. And I had a different position there where I could, in fact, help — I was involved in determining which tests we wanted to do. That's usually a joint process of many people to determine what tests you do. It was open. Everybody knew what tests we were doing. They knew the rationale for those tests.

Those records were open for inspection by all of the scientific staff, by any pertinent agency that might want to come in and look at the [Tr. 93] records. It is usually an open-book kind of thing.

Q. Lever Brothers is a company that has competitors?

A. Yes.

Q. Did the fact that they were competitors in the field selling similar products prevent Lever Brothers from performing whole product testing?

A. No. Not only did we do it on their product but to make sure our product was no more hazardous and worked as well as the competitor's product.

Q. I want to get back to the gentlemen's agreement and understand what were the dimensions of the gentlemen's agreement as you understood it.

As you learned of it, did the gentlemen's agreement include a restriction on any finished or whole product testing by Philip Morris?

A. Yes. Their product and of the competitor's product. So, for example, at the time I was there, Carlton was the lowest tar product on the market, so one might assume that it

might be safer. That was the hypothesis we would operate under.

[Tr. 94] How do you know if it is really safer? So you would have to test it versus Marlboro versus Merit. We came out with Merit Ultra Lights to kind of compete with that. Was it better, equal, the same? Did the blend changes we made, did the manipulations we were doing, are they any better or, in fact, is the cancer-causing potential for a low-delivery cigarette the same as a Philip Morris unfiltered?

Q. If it is possible for you to list the pieces of the gentlemen's agreement, I'm going to ask you to do that. And we have got one of them identified so far. No whole product testing.

A. Let's call it finished product testing. Basically, this is no — no competitive product testing.

Q. So you couldn't test a completed Marlboro, but you also couldn't test a completed Winston?

A. That's correct.

Q. Go ahead.

A. No animal testing in the U.S.

Q. Okay. I will ask you some more about that. Is that the list?

A. Yes.

[Tr. 95] Q. What about testing for cancer-causing potential? Carcinogenicity?

A. Outside of these compounds, lots of testing was done for mutagenicity at Philip Morris in cells. We had like — I don't know if people are familiar with — that's the microbial level tests that we use for mutagenicity —

THE COURT REPORTER : Can you repeat that.

THE WITNESS: There was hamster cell testing. There was a bunch of cell level testing, but we would not use finished product in that smoke from finished products.

We would test Burley versus Bright versus expanded tobacco, so you would test parts of the formulation. From that, you would try to infer whether you were headed in the right direction.

I don't want to give the impression we are not testing. We are doing a lot of testing. The problem is, if I — the example I used. If I made an RL sheet, and that test that shows that it is fantastic, it doesn't cause the mutagenicity, now how do I move from there to find what it does in any product I use it in? I have to test it in the final product in the same [Tr. 96] or different tests, and I have to compare it against different products.

BY MR. GAYLORD:

Q. Was it your understanding that the other cigarette manufacturing companies in the United States had made an agreement that they would not do the same kind of testing that Philip Morris would not do?

A. That was my understanding.

Q. Did you learn at any point why this restriction on testing had been implemented? In other words, what motivated Philip Morris and its competitors to agree not to do these kinds of tests?

A. Two explanations were normally given. One is a competitive war based on safety. As I understood it from my superiors, that there was a very great reluctance to enter into a competitive war based on safe cigarettes. The second part of it was — had to do with potential litigation to not have a paper trail that would look bad should there be potential litigation.

Q. I'm going to ask you to look at Plaintiff's Exhibit 73. This is a document from 1969, I believe. It is a Philip Morris document [Tr. 97] and the name H. Wakeham is at the top, along with Mr. Millhiser.

A. Yes.

Q. Who is Mr. Millhiser?

A. Mr. Millhiser was a senior executive in Philip Morris and then Philip Morris U.S.A. At the time I was there, he was one of the co-chairman or vice chairman.

Q. And you know Dr. Helmut Wakeham?

A. I know both of them.

Q. Dr. Wakeham at this time in 1969 was vice president of research and development?

A. Yes.

Q. It might have been a slightly different title, but vice president in the scientific end of things. And in the highlighted passage the document says, "Unfortunately, too, the scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem. The contribution, which I believe was and is vital because the industry scientists are willing to consider the scientific problem from the point of view of the industry rather than from a position [Tr. 98] of the public health agencies." Is that quoted passage relevant to what you have been telling us about the gentlemen's agreement?

A. That's consistent with it.

Q. Is the suggestion that it has to do with the legal problem consistent with your understanding of the gentlemen's agreement?

A. Consistent with my understanding of why there was such an agreement and why Philip Morris was not willing to do this type of testing.

Q. During your career at Philip Morris did the company or any of its representatives, to your knowledge, ever acknowledge publicly that there was a health problem associated with cancer in cigarettes?

A. I don't think they did. We lived in — we worked in a relatively small environment in Richmond, Virginia. I didn't follow all of the releases of the various agencies representing the tobacco industry, but I'm not aware of any such admission.

Q. Did you gain an understanding during your work there that one of the reasons not to be doing the kinds of testing that you have described as [Tr. 99] restricted was that there not be documents produced that discussed the question of cancer in cigarettes?

A. The desire not to have documents admitting that cancer was caused by cigarettes was expressed many times.

Q. Now, you described — you mentioned getting some test work and — I don't know if you still need to stand over there. I don't have anything to show on the TV right this minute.

You described getting an understanding that there was some testing done in Europe.

A. Yes.

Q. Tell the jury what that was like in terms of how you and your people could get, if you could get access to any testing work done in Europe.

A. Well, we would provide the product modification either in the form of prototype cigarettes or suggestions for how to change an existing cigarette. Sometimes those products would be made in the United States by Dr. Gannon's group or later Mr. Tortrino's group. This is the development people that actually made the product.

So we would suggest how they make them. They would take those products. We would take [Tr. 100] them to Dr. Osdene or one of Dr. Osdene's associates, Dr. Robert Carpenter, Jim Charles, Bill Coon, who worked for him and later worked for me. Dr. Robert Pages. There was a series of people working for Dr. Osdene to whom we could take the concept or product, who would then be responsible for seeing that the proper testing was done, either if it was in vitro testing, that would be done in Richmond, or send it overseas for the animal testing.

And the information, when it came back, would come back to Dr. Osdene. And then what I was supposed to do was to talk with Dr. Osdene about the results of those tests.

Q. How did you work your standpoint as a scientist; was that a satisfactory way of receiving data and test results?

A. It is not ideal, not satisfactory, really, but the issue becomes at some point whether you are going to try to work within the system. I must say that over the time period that I was there, there was always an indication given to me that the system was going to change, that it was going to become more open, it was going to become better.

[Tr. 101] There was an acknowledgement by my boss. A lot of times in order to see a result I would have to go to Dr. Seligman, who would then force Dr. Osdene to show me the result. Not always. Sometimes Dr. Osdene would talk about the results.

Q. Did you have an understanding about whether or not there was any paper trail of test data or test results allowed to flow back and forth across the Atlantic Ocean?

A. Yes, I did. Remember, we are going to distinguish between two types of testing. One is the animal, or in vivo testing, because the in vitro testing done in Richmond, it was much easier to get access to that data. There were reports

written, we could go to meetings, and hear the results. We have to be careful here.

The in vitro testing, the lower level, your first cut at whether it is working or not, still no finished product, still no competitive products, but at least the general concept, like the things that I mentioned before that we had access to.

The animal testing data was the part where there was not supposed to be any paper trail, and Dr. Osdene indicated to me that he [Tr. 102] could not even allow those documents to be on premises.

Q. Was Dr. Osdene sort of the conduit for information from European testing?

A. Yes. He was — that was part of his job responsibility, to interface with the European testing.

There was also testing to be done in the United States that I thought at the time was being done under CTR, or other — there were studies being done in the United States also. But our product testing, the one that was supposedly testing our whole products and testing them against competitive products, was being done in Europe.

Q. Dr. Osdene is a familiar name. Is he the one, correct me if my memory — is he the one who was also involved in maintaining controversy?

A. Yes. Dr. Osdene — on several occasions we had long discussions, many occasions about part of his job description was to be involved in the smoking and health controversy.

Q. Did you ever get to see written document results, papers with writing on them that showed test results from Europe?

[Tr. 103] A. Twice did I remember, yes.

Q. How did that happen, or tell us about what happened?

A. One of them is the nitrosamines in our product.

Q. That's the main carcinogen?

A. Yes. The tab specific nitrosamines testing was done on product and some of that was done in Europe. Dr. Osdene showed me the results in the presence of, I recall, Dr. Charles and Mr. Carpenter. And then he indicated, "Well, I wasn't even supposed to show you that. I have to destroy it. Please give it back to me," which I gave it back to him.

I didn't see him destroy it, but he said he wasn't even supposed to have that there.

Q. Okay. Did you have an understanding of why he was not supposed to have that there?

A. Well, yes. He told me that none of the data generated in Europe under the egis of INBIFO or even Philip Morris Europe back to INBIFO was supposed to be on premises in case there was litigation, that those documents would not be discovered.

Q. Was it your impression that the

* * *

[Tr. 108] Joseph Cullman, III.

Who was Joseph Cullman, III?

A. When I was there, he was the chairman of Philip Morris Incorporated.

Q. He wrote to Dr. Wakeham on February 24, 1970 regarding offshore research, "The possibility of getting answers to certain problems on a contractual basis in Europe appeals to me and I feel presents an opportunity that is relatively lacking in risk and unattractive repercussions in this country."

Is that a document that you are familiar with?

A. Yes.

Q. Is that a document that describes at least some of the motivations behind the restrictions on research in this country that you have been talking about?

A. Yes.

Q. A separate document, the next numbered exhibit. Plaintiff's Exhibit 76 is Dr. Wakeham writing to Vice President Goldsmith at the time when they bought INBIFO. You used the word "INBIFO." You are familiar with that as a facility that Philip Morris purchased in Germany?

[Tr. 109] A. At the time I was with Philip Morris I didn't realize they purchased it until late in my career there, but, yes, they purchased it.

Q. In other words, you didn't always know that it was owned by Philip Morris, but you cameto know that?

A. Yes. When I was at Lever Brothers I was aware of it as being an independent testing laboratory, and when I first joined Philip Morris Dr. Osdene and Dr. Gaisch and some other people led me to believe still it was an independent laboratory. But I think it was 1983 or so, somewhere before I left I became aware that it was owned.

Q. Dr. Wakeham wrote recommending buying INBIFO, quote, since this is a locale where we might do some of the things that we are reluctant to do in this country, close quote.

Is that your understanding how INBIFO was being used by Philip Morris in your career?

A. Yes.

Q. Dr. Seligman was one of your immediate superiors at Philip Morris?

A. Yes, for the first part of my career there.

[Tr. 110] Q. He was replaced by Dr. Hausermann in that same position?

A. That's correct.

Q. Dr. Seligman. Plaintiff's Exhibit 97 also in evidence and seen by the jury, and I will quote quickly. Dr. Seligman wrote to Dr. Hausermann — this is March 31, 1977 — noting that Philip Morris has, quote, gone to great pains to eliminate any written contact within INBIFO, and I would like to maintain this structure, close quote.

They were sending samples to Neuchatel?

A. Neuchatel is where the Philip Morris Europe R&D lab was. Dr. Hausermann at that time was the vice president of research and development of Philip Morris Europe at the laboratory in Switzerland.

Q. He wrote that — Dr. Seligman wrote they were shipping stuff to Neuchatel to, quote, transmit to INBIFO. If this procedure is unacceptable to you, maybe we should consider a dummy mailing address in Cologne. The written analytical data will still have to be routed through FTR, which is in Neuchatel, if we are to avoid direct contact with INBIFO and Philip Morris [Tr. 111] U.S.A., close quote.

Are you aware of that 1977 document?

A. Yes, I reported to Dr. Seligman at that time, and that's part of the genesis of my knowledge of the entire subject.

Q. And this would make it sound like — and I will ask you, was the restriction on dealing with Europe research for Philip Morris such that you couldn't even directly mail things back and forth?

A. Well, that says — I didn't — I never had the opportunity to go there or send them anything directly. Mine always went to Dr. Osdene and one of his colleagues, and they would take care how it got there.

I don't know — they made visits there.

I know that. I talked to them about it. I don't know whether they carried samples at the time they made the visit or how that was done.

Q. Is the experience that you had with Philip Morris, including the gentlemen's agreement and the restriction on research, and including the reticence to bring forward scientific developments, aimed at making cigarettes a safer product consistent with published statements by [Tr. 112] Philip Morris in the industry that said, "We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business"?

A. No, it is not.

MR. GAYLORD: I want to ask Ray to put on Plaintiff's Exhibit 108 on the viewer.

BY MR. GAYLORD:

Q. You are welcome to come down here. I don't know if you can see it from there, Doctor.

This is a letter from Dr. Seligman to Dr. Spears, who was apparently research director at Lorillard.

A. I know them both, yes.

Q. Is this dated March 31, 1980?

A. Yes.

Q. On the first page, which is the cover letter, there is a highlighting which shows a statement, "I have added a list of three subjects which I feel should be avoided." The context is referring to test subjects for scientific research.

A. If I recall correctly, this has to do with research that CTR should do, or one of the groups, tobacco groups.

[Tr. 113] Q. Perhaps. I'm just reading a section of it. Let me look at the whole letter.

Yes, it is recommendations for industry research which they prepared last year. "To that end, you will find attached a list entitled Potential Long-term Scientific Studies which Dr. Osdene and I generated early last year."

Then there is an enclosure that has a long list of subjects, and then there is a second page which is the one referred to in the last sentence that we read and it is three items to be avoided for research. It says, "Developing new tests for carcinogenicity is Item 1. Attempts to relate human disease to smoking for Item 2."

A. Yes. The third one is also significant.

Q. I can't read it from here.

A. It says, "Conduct experiments which require large doses of carcinogen to show as additive effect of smoking."

Q. Under the circumstances — let me depart for a moment on that subject.

Item 3 on there that I did not highlight, is smoking, as you understand the process, a behavior that results in large exposure to any carcinogens that happen to be in smoke because of [Tr. 114] the frequency of the use of the product?

A. There are large doses already there.

What I believe this refers to, if I remember conversations of the time had to do — talk with Dr. Osdene about testing being done in Europe with regard to the effects of some of the additives that were being used.

Q. In your experience in consumer product testing before Philip Morris, was it important to consider the way a product is used and the frequency and amount of exposure that it would generate?

A. Yes.

Q. And should testing be designed to take into account the extremes of exposure in order to adequately address the question of risks from the product?

A. Well, yeah. It also — not only the extremes of exposure, but what this relates to is if they wanted to show that — by "they" I mean the industry, Philip Morris directly, that an additive was okay, what you do is you take a highly carcinogenic reference cigarette. You test that. You add a little bit additive to that and you test that. You show there is no difference [Tr. 115] between the reference cigarette and the reference cigarette plus a small amount of the additive. You say, "See, the additive didn't make this any worse."

And that was a particular kind of additive testing to which I objected to at the time, because I felt it was playing tricks with the test system.

Q. With respect to this statement of three subjects to be avoided in testing by the industry testing process in the CTR, I hadn't thought of this before, but I will ask, does this appear to represent perhaps a documentation of at least one-manifestation of the gentlemen's agreement?

A. Well, they are all — yes, this is consistent with the gentlemen's agreement.

Q. Is this limitation on testing by the industry consistent with the practices of an industry that is concerned about the health effects of its product?

A. No.

Q. Is this representative of an industry that holds people's health as a basic responsibility paramount to every other consideration in their business?

* * *

[Vol. 10-A] [Testimony of William Farone (Mar. 5, 1999)]

* * *

[Tr. 61] Q. Okay.

A. Because that's the only way you know whether the change you have made are actually getting to the smokers. Smokers don't smoke reference cigarettes.

Q. Okay. A couple things on that. Well, did the Surgeon General or the National Cancer Institute or Ernst Wynder at the American Health Foundation, they were able to test Marlboro and Merits, whole product testing?

A. I think the agreement with the National Cancer Institute was they wouldn't do that.

Q. Well, a private researchers out, you just have to go to the store, buy them off the shelf and take them in and do full product testing all day, right? That testing can be done?

A. That testing can be done, that's true.

Q. Okay. Well, has that testing been done and shown big differences?

A. I don't know if anybody has had the resources, other than the tobacco company whose products they are, to do that type of testing.

You have to have animal laboratories, you have to have cell testing laboratory to do that.

Q. You can contract that stuff out, can't [Tr. 62] you?

A. Who is going to contract it out?

Q. How about the Federal Government? How about the National Cancer Society?

A. I am losing you here.

Q. My point is, as I understand where your complaint is, is Philip Morris didn't test a Marlboro as a Marlboro, right?

A. And the suggestion — what you're saying is that we can use taxpayer money to test the products at Philip Morris, they don't need to do that?

Q. You don't want to get into taxes, do you?

You don't want to go there, do you?

A. You can.

Q. Here's what I'm saying. Philip Morris tested reference cigarettes, correct?

A. Correct.

Q. Philip Morris tested additives, right?

A. Philip Morris tested additives?

Q. Additives to tobacco.

A. They tested them separately from the reference cigarette?

Q. So Philip Morris tested, for example, when you burn it, it becomes carcinogenic. I [Tr. 63] don't want to spend a bunch of time on this, but we can, as I understand the debate, where it is sufficient to test the reference cigarette and the stuff you put in it separately, or whether you need to test the stuff altogether. Is that what we're talking about?

A. No, no.

Q. Okay. Let me ask you this, you would agree, whether Philip Morris did it, other people could have done it if they wanted to?

A. I agree that other people could have done it if they wanted to.

Q. Can you cite a study where they said the Marlboro testing is different or worse? The whole product testing made a difference?

A. Yes.

Q. Tell me the study, write that down.

A. It is in the Japan Tobacco and Salt Monopoly, the Japanese patents. They don't list what they are.

Q. Let's write that down. Let's flip a page. Whole product testing that was done on Marlboro that shows something different.

A. Okay. The problem is I don't know which in that study is which brand.

[Tr. 64] Q. If you don't know which was which brand, how can you tell the jury what it meant?

A. No. The question was whether or not it was done. I am just telling you I know where such research was done. It was done under codes. You would have to ask the Japan Tobacco and Salt Monopoly, what it is called now, which one was which, but they did that for some of their patent work to show that the — their patented products were safer, were safer than Marlboro, but I don't know which was which.

Q. Was that published in the scientific literature?

A. I believe — certainly, it is in the patent literature, but, yes, there are scientific literature.

Q. Write down then Japan Tobacco, patents, scientific literature.

A. (The witness complies.)

Q. Would you write testing up there, it's whole product testing.

A. (The witness complies.)

Q. Okay. Let's go back to projects Philip Morris killed. Do you know how much money was spent on genetic modification of tobacco?

[Tr. 65] A. Well, the problem with this is there are two projects. There is one while I was there, and there was one

after I was there, the Calgene project, C-a-l-g-e-n-e, and I don't know that one. The incident here was to — I believe the contract if I recall correctly was $300,000. It's with a company called Crop Genetics International, and we probably spent another half a million dollars internally.

Q. So Philip Morris contracted with an outside company to do some of this?

A. Yes.

Q. And did some in-house?

A. Yes.

Q. What's the next project Philip Morris killed?

A. Measurement of radioactive compounds going into cigarettes.

Q. Tell the jury about that.

A. I mentioned earlier that I think it was 1979 and 1980, Dr. Robert W. Jenkins and Dr. Mary Ellen Counts (ph), found that polonium 210 was picked up on the surface of tobacco leaves and about 50 percent of it went in the tobacco, and 50 percent upon the leaf.

* * *

[Tr. 70] A. (The witness complies.)

Q. Tell the jury what that is.

A. When I arrived at Philip Morris in 1976, Philip Morris had applied for and received a patent in 1974, for producing a filter material or a catalyst, if you will, that would, in fact, remove carbon monoxide from smoke.

The unfortunate part of this material, it's a cobalt catalyst, the unfortunate thing was that when it was wet, it wouldn't work very well. When you smoke a cigarette, of course, the smoke coming through is wet, so it would deactivate the catalyst.

The group working for me decided that they would relook at that; and, in fact, produced a catalyst material through which you could smoke 20 cigarettes without it becoming deactivated. And this was actually demonstrated, smoke a pack of cigarettes through it, and I think it is about 1981–82, something in that time frame.

Mr. Wally McDowell presented that idea to the Board of Directors and said, "Well, we could sell this product on the market." It was presented as being one of our major accomplishments for the year, of having taken this [Tr. 71] technology which previously was thought not to work and put into a product.

Now, one of the things about the product that we tested, it wasn't inside the cigarette filter, so this would have been an article that you put cigarettes in, like an external filter, and smoke the cigarettes through that.

The concept at the time was that you would sell one of these with a pack of cigarettes and you would smoke the pack of cigarettes through the filter.

Q. And let me make sure I understand. You thought that would reduce carbon monoxide, right?

A. The evidence showed that it would remove more than 99 percent of the carbon monoxide.

Q. You thought that would provide a health benefit to the smoker?

A. Right.

Q. And you thought it was ready to roll, correct?

A. Right.

Q. And Philip Morris killed it, right?

A. Right.

Q. What did you do about?

A. Complain.

* * *

[Tr. 113] it, that Philip Morris has a financial interest in making a safe cigarette?

A. That is a very difficult question. I don't think that's necessarily true.

Q. Well, let's explore that. 50 million people in this country smoke, right?

A. Correct.

Q. They smoke cigarettes with a warning on the back that says they cause cancer, right?

A. Correct.

Q. If Philip Morris could come up with a cigarette that people liked, that people smoked, that didn't cause cancer or didn't cause most cancers, it would be a license to print money, wouldn't it?

A. No.

Q. Really?

A. The problem is that Philip Morris Marlboro cigarette is the largest selling brand. If you open the door to a safer cigarette, you open the door that your competitors might also sell a different brand. It is not going to be the same as Marlboro; it is not going to taste the same as Marlboro, so Marlboro share might go down like a rock if RJR came out with a safer [Tr. 114] cigarette.

As soon as you have opened the door to safer cigarettes, you've opened the door to Marlboro losing its preeminence as a brand, so that might absolutely kill Philip Morris.

Q. Let's test that, let's test that. You've got 50 million people who are smoking cigarettes right now that may well cause cancer, right?

A. Yes.

Q. In fact, most people believe they do. Wouldn't you agree that most people believe cigarettes do cause cancer?

A. Except for people that work in the industry.

Q. Sure, they hear me say there is a statistical association, they say, "Hogwash." They say it causes cancer, right? They hear me talk about scientific proof versus epidemiology and they go, "It causes cancer," right?

A. I hope so.

Q. I mean, that's what people believe, don't they?

A. I hope they understand.

Q. Yet 50 million Americans smoke, right?

A. Is that 17 percent?

[Tr. 115] Q. It's 25 percent, but if you are not comfortable with 50, let's say 40?

A. Okay.

Q. A bunch of people smoke.

A. Lots.

Q. Now, think of it, if Philip Morris or any company, not just Philip Morris, but Philip Morris is here today, so let's talk about them, could come up with a cigarette that made the nicotine in a cigarette like caffeine in coffee, you get you nicotine hit, you get your caffeine jolt, no health problems, you are on your way, that is an absolute license to print money, isn't it?

A. I still disagree. I'll give you another reason.

Q. Give it to me?

A. Because that's an admission that the product you have been selling before is not safe. It opens all kinds of prospects of litigation that could cost you money.

Q. You know, I've heard that and here is what I was wondering about that. Do you think a jury would be mad if Philip Morris came out and said, "You know what, we were finally able to do it. We can show you how we worked on it. We've

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[Vol. 10-B] [Testimony of William Farone (Mar. 5, 1999)]

* * *

[Tr. 126] A. Yes, he did.

Q. To your knowledge, is that the first time that any agent of Philip Morris has ever made that admission?

MR. COFER: Objection to that.

THE COURT: The basis?

MR. COFER: The objection is that misstates what I said. Second, it is argumentative. Third —

THE COURT: Go ahead.

MR. COFER: Third, the legal significance is beyond this witness.

THE COURT: Objection is overruled. Go ahead.

THE WITNESS: That's the first time I have ever heard that in a public forum.

BY MR. GAYLORD:

Q. To your knowledge, does Philip Morris spend a great deal of money avoiding that admission?

A. Yes.

Q. You wrote some words and some descriptions of projects that were killed by Philip Morris. I just wanted to ask you, were there more that you didn't finish putting on that

* * *

[Tr. 137] BY MR. GAYLORD:

Q. Did the possible consequences in the litigation situation affect what you and your people were able to do scientifically?

A. Yes.

Q. And did it affect, as you could tell, the policies of the company with respect to pursuing safer cigarettes?

A. Yes.

Q. Is the question about financial interest in making a safe cigarette answerable before we know the outcome of litigation against the company today?

MR. COFER: Objection. Argumentative.

THE COURT: Overruled. Go ahead.

THE WITNESS: The company could have made safer cigarettes all the way along.

BY MR. GAYLORD:

Q. Now, Mr. Cofer made the statement this afternoon, is it misleading to tell part of the story and not to tell it all. With that preface, I want to ask you about a quote that was made from an article involving you in the Washington Post.

The quote was, "Boy, wouldn't it be wonderful if we were the first cigarette company to admit" —

* * *

[Tr. 147] And then we heard the term "anti-carcinogen" in this last page.

A. That's correct.

Q. Anti-carcinogen, does that mean that these were in any sense put there to prevent cancer?

A. No. It means that there are some compounds that when you test them have the opposite of causing cancer. They will, in fact, protect cells by some of the mechanisms by which cancer can happen or mutagenesis can happen.

Q. You are referring to the testing of the ingredients individually?

A. Yes.

Q. Philip Morris never put all these things together into the stew and tested it to see if the total smoke of the cigarette caused cancer?

MR. COFER: Objection, leading.

THE COURT: It is cumulative, Mr. Gaylord.

MR. GAYLORD: All right. Thank you.

BY MR. GAYLORD:

Q. In view of the document that we were just looking at, written by Dr. Wakeham, do you have an opinion it was reasonable conduct by a scientist [Tr. 148] in Dr. Wakeham's position to deny in 1976 that there was evidence that smoke contains — causes lung cancer?

A. It is not a reasonable scientific position.

Q. Or Vice President Bowling in 1976 to deny that anything had been identified as an ingredient in cigarette smoke that caused cancer?

A. Again, that's not a reasonable scientific position.

Q. Dr. DeNoble was the subject of some discussions and he wrote some things and used a word "reinforcing agent," rather than "addiction" for nicotine. Do you recall that discussion?

A. Yes.

Q. Do you recall that Dr. DeNoble, in fact, in talking about that subject, has indicated he means by "reinforcing agent" one which would maintain the brain receptor qualities of nicotine?

A. Yes.

Q. And you knew Dr. DeNoble pretty well when he was there?

A. He didn't work for me, but we had — we would meet for coffee and talk things over quite often.

[Tr. 149] Q. Do you have reason to believe that he understood that nicotine was a chemical-dependence causing substance?

A. Well, you know, I went to all the presentations he made. I read the reports. I discussed it with him and his colleagues, and, again, he had an understanding of the effects of nicotine.

Q. Would it have made any sense for Dr. DeNoble to be studying the nicotine analogs for reasons that he and Dr. Seeman were doing it if they didn't believe that the nicotine was the habit-forming substance in cigarette smoke?

A. It's the main pharmacological ingredient, and that's why they were studying the analogs.

Q. The point of the analogs was to get something that would cut down on the effects on the heart, that nicotine was not the cause, while still supplying the drug effect, the hit to the smoker?

A. The pleasurable sensation, yes.

Q. And Dr. Osdene was one of the authors or signatories of one of the documents that supposedly denied nicotine was addictive?

A. Yes.

* * *

[Vol. 11-A] [Testimony of Elizabeth Whelan (Mar. 8, 1999)]

* * *

[Tr. 37] But, jurors, I need to give an instruction about a ruling I have made earlier in the case, and now is as good a time as any to give it to you, and I'll give it to you again at the end of the case.

The instruction has to do with the affect of the warning label on the cigarette packages versus other evidence you are going to be hearing in the trial.

For example, you may be hearing evidence or you may have argument at the end of the case that suggests that Philip Morris failed to disclose the results of scientific test tests or that it failed to conduct certain scientific tests to determine harmful affects of smoking.

Keep in mind that when you hear evidence of this nature that there is no claim in this case that Philip Morris had a duty to disclose to Jesse Williams any information concerning the alleged harmful affects of smoking, other than to provide him with the federally-mandated package warning labels.

Because the Marlboro cigarettes, purchased by Mr. Williams, after September 1, 1988, had the required package warnings, Philip [Tr. 38] Morris satisfied its duty to warn Jesse Williams of the health affects of smoking as a matter of law.

You should not consider evidence that Philip Morris failed to disclose the results of its scientific tests or that it failed to conduct certain tests as any evidence that it failed to warn Jesse Williams of the health affects of smoking.

However, you may consider evidence that Philip Morris made false statements, and you may consider evidence that Philip Morris failed to reveal information where you also

find that Philip Morris made misrepresentations that were half truths or otherwise complete statements.

And you may consider such evidence for the purpose — excuse me. I misread my notes. Let me go back to the beginning of that sentence.

You may consider evidence that Philip Morris failed to reveal information where you also find that Philip Morris made misrepresentations that were half truths or otherwise incomplete for the purpose deceiving the public, including Mr. Williams.

So, when you hear references to the term [Tr. 39] preemption, what that is is a short-hand flag for the rule that the warning label on the cigarette package is sufficient as a warning as a matter of law. There is no claim about failing to warn because of the package label. What you may be hearing is evidence about a failure to provide information or actual misstatements by Philip Morris, and you may consider that for its bearing, if any, on the claim there was deceit of the public, including Mr. Williams. Anything else?

MR. COFER: (Negative response by head shake.)

THE COURT: Okay. Go ahead, Mr. Gaylord.

MR. GAYLORD: Thank you.

BY MR. GAYLORD:

Q. Dr. Whelan, obviously, we are not going to be talking about adequacy of warnings. As we go, just foreshadowing, I will be asking you what you know about the state of science and truth about some of these issues and the relationship between that state and some of the affirmative statements

* * *

[Tr. 61] Pump, which was causing epidemics. I believe it was cholera. And the water coming out of that pump was making people sick, very sick, and he didn't know what it

was. I mean, you know, what they did was they turned the water off, and it stopped the spread of the disease. So, again mechanisms were not in place.

Epidemiology is a very useful tool which can later be verified by biological explanation, but you don't have to say we don't think this is a cause because we don't have all of the i's dotted and t's crossed.

Q. I want to ask you for an opinion, if you hold an opinion to a reasonable scientific probability.

And, by the way, any opinions that you have expressed today should be limited to that standard. In other words, give us your opinion only if you hold it to a degree of reasonable, scientific probability. Will you do that?

A. Yes, I will.

Q. And have you done that so far?

A. Yes, I have.

Q. I'm going to ask your opinion. When did smoking become identified scientifically as the [Tr. 62] major cause of lung cancer?

A. In answering that question, I have to tell you that my answer is a relative one.

By today standards, looking back, I would think that there were — there may have been enough evidence to take cautionary measures by the mid and to late 1930s.

But, being more conservative in my answer, I will say that surely, absolutely by 1957 there was sufficient evidence which had been repeated and confirmed internationally that smoking was the leading cause of, preventable cause of lung cancer.

And I choose 1957, but it's really kind of stretching out there, to try to be really fair about this, but because I believe

that the evidence was in before that sufficient that people should have been told.

Q. What happened in 1957 that gives you that mark in time as a notable one?

A. During, as I mentioned, during the early and the mid-50s, there was a series of prospective and retrospective studies being done in the United States and the United Kingdom, which clearly showed that, as I mentioned, cigarette smoking and lung [Tr. 63] cancer were casually related.

But in 1957, as I recall, the then Surgeon General, I think his name was Dr. Leroy Burney, and he was the head of the public health service, they held a — they released a paper which reviewed the literature at the time, and came to the conclusion that, as an official public health U.S. government public health service statement, that cigarettes cause lung cancer.

During the same year, a similar kind of body in the United Kingdom came to the same conclusion.

I mention that year because it was sort of, if I can use that word, consensus statements were beginning to be formed. These were not individual studies. These were people who looked at all of available literature and said where do we stand now with our knowledge?

And I would say by 1957, it was in.

MR. GAYLORD: Excuse me, Your Honor.

I believe we have an admission in response to a request for admission that Defendant Philip Morris was aware of Dr. Burney's statement at that time. I didn't find it just now to read it, in so many terms.

* * *

[Tr. 66] A. Industry Research Council.

Q. Research Council, TIRC or Committee or Council for Tobacco Research. Which is the other name.

A. Switched names mid-stream.

Q. If I say industry I don't mean other manufactures.

A. I understand.

Q. Those branches. Okay.

A. Uhm-hmm.

Q. Could you give us an overview of the relationship between the scientific truth that had been established by that time and the publications and positions taken by Philip Morris or the industry in the sense I have just redefined?

A. Yes. The timeframe is 1950 to —

Q. 1950 into 1960s?

A. — 1960s.

To my knowledge, Philip Morris did not formally respond to this growing literature on cigarettes smoking and public health and lung cancer in particular prior to approximately January 195for.

In January 1954, Philip Morris joined with other companies to form the group just [Tr. 67] mentioned, the Council for — the research council regarding cigarettes and health, and took out a full-page ad to announce the formation of this research committee which were to be funded by a number of different cigarette companies.

And this ad, which is now known, which was known, was called the Frank Statement. I believe it was published — I don't have all of my notes here. I'm working without notes. But I think it was January 4th, 1954.

And, to my knowledge, this was the first public statement made by Philip Morris that I know of, and they made it as part of this consortium with other companies.

And this Frank Statement, in my opinion, is anything but frank. You asked me to relate their public stances with the literature in the hand; and, as I have already mentioned, by January 1954, there was an extraordinary amount of evidence linking smoking and linking cancer.

And that came from those clinical observations I mentioned, the '30s and '40s and the retrospective studies which had already been published in 1952 and the prospective studies which were actually published I think just shortly after [Tr. 68] this but the results were already leaked out.

So, for this Frank Statement, which basically says there's no evidence that smoking causes lung cancer, is completely out of line with what the knowledge was at the time.

Now, what's even more extraordinary about this Frank Statement is the way it begins. It begins by calling attention not to the human studies, which they have described to you, but talking about these rodent studies of the painting of the skin and the tar. And that is how this so-called Frank Statement begins.

I think the thrust of it was to say hey, it says, smokers, non-smokers, whoever. It was placed in newspapers all across the United Stateson this day. And it was distributed copies to, you know, thousands of doctors and politicians. It was the official statement of the newly formed consortium of cigarette companies.

Basically, it said that they know of no evidence, but that they would put in money to research to see if there is evidence. And I think the implication of this ad is, if there's ever any evidence that smoking causes lung cancer, we'll let you know.

* * *

[Tr. 78] been discussing.

This is Exhibit 10, Plaintiff's Exhibit 10. It's dated March 31, 1954 from the Oregonian.

I'm corrected. It's from Pacific News Source. I beg your pardon.

And it's a publication that says March 31, 1954, the cigarette industry would, quote, "stop business tomorrow if it thought its product was harming smokers, according to George Weismann, Vice President of Philip Morris & Company, in a speech in Chicago Tuesday. He blames the cancer problem on medical propaganda by a small number of doctors and a large number of magazines and newspapers."

I want to focus on that last part.

Medical propaganda is a — well, it's a phrase that I suspect you would be familiar with based on what you do and what your organization is all about?

A. Yes, I'm familiar with it.

Q. Was it a frank and fair description of the smoking and health issue in March of 1954 to label it medical propaganda?

MR. COFER: Objection. Leading.

Argumentative.

MR. GAYLORD: I'll rephrase.

[Tr. 79] THE COURT: Go ahead.

MR. GAYLORD: Thank you.

BY MR. GAYLORD:

Q. How would you characterize this characterization using the phrase medical propaganda in relation to what was known about smoking and health at that time?

A. I would characterize it as absurd.

Again, as we have discussed or I have discussed, there was a vast medical literature at this point of studies of human

beings, smokers and non-smokers. This has nothing to do with propaganda of the kind that would be made up with no data at all.

I also find very interesting, if I might say, that the quote of Mr. Weismann that we will give up basically marketing cigarettes if they are harmful to health.

Starting in 1954 and continuing on through today the Tobacco Institute and the individual companies have maintained that there's no evidence, the evidence is not there, but they never set out what criteria they would accept.

Even in this particular quote. He seems to say well, if it was harming us, harming people, [Tr. 80] we would withdraw it, and it's all propaganda.

But what evidence is lacking, Mr. Weismann? Or what criteria are you following whereby you are rejecting the current data but that you would accept some unknown data? That has never been set forth by the trade association for the cigarette companies or by the companies individually.

Q. Since you bring up that subject, have you pursued the answer of the Tobacco Research — TIRC/CTR or the Tobacco Institute? Have you sought their answer to the question what research would convince them that their product was harming smokers?

A. Yes, I have pursued that, starting in the early 1980s. I wrote a number of letters to the president of the Tobacco Institute. Basically, that this letter said — his name, by the way, was Horace Kornegay.

And I asked Mr. Kornegay, I said, I have noticed that you folks say that 60,000 plus studies in the medical literature linking smoking and disease are insufficient and that they don't prove any cause and effect.

I asked him by what standards do you

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[Tr. 91] is being observed.

Q. Can you characterize, based on your study of this subject, how Philip Morris and the public relations and, quote/unquote, research organs of the tobacco industry dealt with the issue of smoking and health from the time of the Frank Statement forward? Is there a pattern or a strategy that is discernible from what they did?

A. The pattern, particularly of the Tobacco Institute and as the public spokesman for the cigarette industry, was the same as it was in 1954, to say that there was no evidence that smoking caused lung cancer, and then later they deny other diseases as well. That denial has continued up until the present day, including testimony before the U.S. Congress.

Q. Are you familiar with the research work and the research funding of the TIRC and CTR as it proceeded? And I'm not going to ask you in great detail. But as a general overview are you familiar with the kinds of things they engaged in and what kinds of research they have promoted?

A. Yes. The Tobacco Research — the Tobacco Industry Research Council, which was announced in the Frank Statement in January 1954, said it was

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[Vol. 11-B] [Testimony of Elizabeth Whelan (Mar. 8, 1999)]

* * *

[Tr. 23] little bit closer to home.

This is a 1964, January 12, 1964 story appearing in The Oregonian here locally. I believe that's the day or the day after the publication of the Surgeon General's Report of 1964. The topic is, new tobacco report designed to go beyond peril of lungs. The Oregonian has cited spokespersons from the industry, particularly from Philip Morris — I'm sorry Tobacco Institute. Beg my pardon.

MR. COFER: What's the exhibit number?

MR. GAYLORD: 161.

BY MR. GAYLORD:

Q. "The tobacco industry claims, however, that a causative connection between smoking and impaired health has not been proved."

Was that a valid scientific statement on January 12, 1964?

A. It is not.

Q. "In a detailed report released Thursday at Greensboro, North Carolina, the nation's tobacco companies claimed the vast majority of smokers suffer no serious impairments of health or shortened life."

Let me ask you, Dr. Whelan, with respect [Tr. 24] to that statement, is that relevant and significant to the question whether smoking cigarettes causes lung cancer?

A. It is significant in the sense that it misrepresents the knowledge at the time.

Q. It is not true?

A. It is also not true.

Q. Does the — would the fact that some smokers do not suffer serious health consequences in any way negate the findings of the epidemiology and the science published as of this date?

A. The answer is no, but I must say I am a bit confused as to how I should answer a question like that. Should I just say no, or should I — I don't want to give a speech which obviously I was criticized before. But I feel no is not a sufficient of an answer.

Q. Why do you say no?

A. No. Because we're looking here about increased risk. The fact that every one does not get the disease in question does not negate that it is a very powerful cause of the disease.

Q. In the field of epidemiology and public health, is it common for causes of disease to be less than universal in their effect?

* * *

[Tr. 30] MR. COFER: Objection, lack of foundation. What sources?

THE COURT: Rephrase, please.

BY MR. GAYLORD:

Q. We've talked about several sources so far of the information that the industry was publishing, which showed examples of — and some information that the Philip Morris company had internally, and just without any more than that, I will ask you, can you answer the question, did the Reader's Digest article or other public press releases overcome the impact of the false controversy building effort of Philip Morris and the industry, public relations.

MR. COFER: Same objection.

THE COURT: Overruled. Go ahead and answer.

THE WITNESS: The Reader's Digest articles were the exception to the rule. They were — there were very few magazines that covered the dangers of smoking and, no, there were few publications did not any way meet or overpower the denials from the industry.

BY MR. GAYLORD:

Q. Dr. Whelan, are you familiar with the

* * *

[Tr. 51] reasonable consumer aware of the information this witness was aware was available.

BY MR. GAYLORD:

Q. Make the same assumption, Dr. Whelan. And the question I'll ask you, do you have an opinion, to a reasonable scientific probability whether the cigarettes that Jesse Williams smoked were dangerous beyond the contemplation of an ordinary consumer under these circumstances?

A. I have heard the argument that people should be responsible for their own behavior. That requires information. And I will answer your question by saying I do not believe that there was sufficient information out and made available that that informed decision ever took place.

Q. When Philip Morris has disclosed publicly positions that the proof was not in on the question of causation of lung cancer, you've told us a good deal about what you believe the medical science and proof was during these relevant periods of time.

Let me ask you a couple of different details about the state of scientific knowledge whether Philip Morris made those statements. First, what has been known in medical science

* * *

[Vol. 12-A] [Testimony of James Kern (Mar. 9, 1999)]

* * *

[Tr. 118] A. There was a tumor within the airway, and it was biopsied and found to be a lung cancer.

Q. Now, on I'm looking at a page of your, again, you dictated notes on October 11, 1996.

A. Okay.

Q. Do you have that?

A. Yes.

Q. And that is further follow up of all of this process in a dictated report by you, but there's handwriting on the bottom corner of that?

A. That's correct.

Q. Is that your handwriting?

A. Yes, it is.

Q. And does that indicate that you, by that time, you received a preliminary pathology report from the biopsy?

A. Yeah, I can't say whether I actually received. The note doesn't say whether it was through conversation with Dr. Turner, he had called me with the results, or whether I had actually seen a biopsy, you know, the official pathology report. But I indicated that it was what I call the squamous cancer of the lung. And that my other notation there was I was going to keep him on medication to try to continue to help reduce.

* * *

[Tr. 121] Q. Okay. Now, as the primary physician diagnostician in this case, did you form any conclusions about whether this was a type of cancer that was known to be caused by smoking?

A. Yes, I did.

Q. Did you form an opinion to a reasonable medical probability whether Jesse Williams' lung cancer was caused by smoking cigarettes?

A. I believed it was.

Q. And now subsequently in March of 1997 Jesse Williams died. And you have, I see in your hand, a copy of the death certificate?

A. I do.

Q. And in the interim time between October of '96 and March of 1997, did you continue to have an active role in his care?

A. I did not have an active role in his care. I had referred him to, after this diagnosis, to one of our medical oncologists or cancer specialists for treatment.

Q. Who's that?

A. That is Dr. Gerald Segal.

Q. He's one of your partners and his specialty is the treatment of cancer after they are diagnosed?

[Tr. 122] A. Yes.

Q. All right.

By the way, had you ever discussed smoking with Jesse Williams?

A. On occasion, we discussed smoking with him, yes.

Q. I'm aware of a note, I think we talked about it already, on the June 27, 1996 chart entry. I have got the right one. You said he was a smoker of one and a half packs a day. And then I think I was mixing that up with the other one.

A. Might be — well —

Q. I'm not seeing exactly which one. It was one of your dictations, and I'll find it. It indicates that he had difficulty quitting smoking.

A. There was a mention on June 27th, 1966 that I encouraged him to stop smoking. He would seriously consider that. That is one that I see.

Q. Okay. My question about that is just this. We have heard suggestions in the case here about what physicians do with respect to patients and smoking.

Did you always routinely, without fail, discuss quitting smoking with Jesse Williams?

A. I don't say — I can't say that every [Tr. 123] visit I routinely discussed quitting smoking. I think my usual style would be to periodically bring that up visits. And I may or may not spend a lot of time doing that at my particular visit. And it may or may not be reflected in charting, depending on how much emphasis was placed on that during the visit to the physician.

Q. Generally speaking, if you pursued the subject with a patient like Jesse Williams of trying to get him to quit smoking or talked about efforts to quit smoking, to put serious emphasis on it on a given visit, would that be reflected on your charting for that visit?

A. I believe that is a fair statement.

Q. Did you make any observations from the sources available to you about the aggressiveness of Jesse Williams' cancer?

A. Well, I felt that his big difficulties began in 1996 with this, and that it was looked for with some x-rays early in 1996 and it just couldn't be ascertained at that point that it was there. And it appeared in an aggressive way later in 1996. So, I felt that really things came to light during that time in a fairly quick way.

Q. Have you formed an opinion, to a [Tr. 124] reasonable medical probability, whether the cigarettes that Jesse Williams had smoked during the preceding eight years before his diagnosis was a substantial contributing cause of the cancer and his death?

A. I believe they were.

MR. GAYLORD: Thank you, Dr. Kern.

THE COURT: Cross-examination.

MR. SIRRIDGE: Yes. Thank you, Your Honor. I was going to take a couple a minute or so to set up.

THE COURT: Sure.

MR. SIRRIDGE: Sorry we didn't figure this out before.

THE COURT: Are you going to need the witness down near the monitor?

MR. SIRRIDGE: It's possible, but he has his own chart with him so that probably will not be a problem.

May it please the Court.

THE COURT: Certainly. Go ahead.

* * *

[Vol. 12-B] [Testimony of Mayola Williams (Mar. 9, 1999)]

* * *

[Tr. 27] A. So yes.

Q. So what was he, a sergeant?

A. Yes, he was a first sergeant.

Q. Okay. Now, when you met him, had been overseas yet?

A. Yes.

Q. And did you learn about where he had gone in the world while he was in the Army?

A. Yes. He told me a lot about his Army career.

Q. Okay. Well, tell the jury which countries he had been to.

A. He first — after he left Texas, then he went to Fort Knox. Is that in Georgia, I believe? And then he went to California. And after that, he was shipped over to Japan.

Q. Okay. Did he also go to Korea?

A. Yeah. After he stayed in Japan for about a year or so, then he was in Korea, in Seoul, Korea.

Q. Now, of course, we know what this case is about, and it has to do with smoking. So how was it that he came to become a cigarette smoker in Korea?

A. Well, he was part of the — part of the [Tr. 28] artillery part of the Army there. And that meant that at night they had to stay on guard and guard the artillery. So there was — it was a lot of mosquitoes; and, you know, just very bad condition there.

So the Red Cross gave cigarettes. In fact, they gave Philip Morris cigarettes to the soldiers to smoke — I mean to the Army and the Army gave them out to the soldiers.

Q. And was he given Philip Morris cigarettes?

A. Yes, he was given cigarettes to — cigarettes to keep the mosquitoes off of him. I can say this, if you don't mind — I'm going to add that Jesse would never have smoked cigarettes if he hadn't been given the cigarettes while he was in the service, because he was 19 years old when he went in the service.

And I believe his brother had sneaked around and started smoking, because their family wasn't smokers that I know of, and that he was not, you know, he didn't do it. He didn't do anything like that.

Q. So was it correct that he didn't smoke back when he was on the farm, but when he left [Tr. 29] home is when he started?

A. That's right.

Q. Okay. Now, by the time that you met him, was he smoking cigarettes regularly?

A. Yes, he was.

Q. Okay. Now, I remember when we were sitting here, and I showed Dr. Pollay one of the ads — I don't know whether you can see it. It is not a great picture, but it shows the Philip Morris cigarette. Is that the kinds of cigarette that he smoked back when you met him?

A. Yes, that is the kind he was smoking.

Q. Now, just to give a little, I guess, education to the jury, are you a cigarette smoker?

A. No, I'm not.

Q. Have you ever been?

A. No, I have never been.

Q. Okay. Do you like cigarette smoking?

A. No, I hate it.

Q. Okay. Did you hate it back when you lived with Jesse Williams?

A. Yes, I did. Not at the beginning.

Q. Okay. But as time went on, and we're going to go through that as we go through the afternoon, what was it that led to you falling in [Tr. 30] love with and deciding to marry Jesse Williams?

A. Well, he was just a very nice person, and I noticed one thing about him, that he liked children a lot, because I had younger sisters and brothers, me being the oldest of my family. And he was always, you know, playing with the kids. And he was just kind of a very nice person like that. And we dated, so I just grew to fall — grew to love him, you know.

Q. Did he want to have a family?

A. Yes. We talked about that.

Q. Was there a period there where he was at Fort Lewis still and you were down in Portland where the two of you wrote love letters back and forth?

A. Yes, uh-huh.

Q. And then did he eventually move here to Portland, rather than you going back to Crockett?

A. Right.

Q. Okay. Now, I don't want to spend a whole lot of time on background things, but what I would like to do is to give the jury sort of an introduction to who Jesse Williams was back in the '50s.

After he got out of the service, did he [Tr. 31] work a series of different jobs in the Portland area?

A. Yes, he did. When he got — we got married before he got out of the service. And when he got out of the service, well, we — he had taken his money that he had, and we paid down on a home, and that's where we started our family. And he worked several jobs at that time before he got a job working for the City.

Q. All right. Now, when he was — and I'm just going through the '50s — was he somebody who liked sports and athletics and things like that?

A. Yes.

Q. And did he look at magazines and look at some of the ads in the magazines at your house?

A. Yes, he saw ads like — similar to those.

Q. I don't know all the names here, but, for example, here's one in — I think the name is Joe DiMaggio.

A. Yeah, I see that. Yeah, we saw that.

Q. Did he like to look at the — did he like to look at the baseball games and basketball games when he had the paper and the scores were in the paper and that?

A. Yes. That's the most of the part of the [Tr. 32] paper that Jesse read was the sports ads. I mean, that's the most part of it he read.

Q. At some point, did he begin smoking the Marlboro cigarettes?

A. Yes.

Q. And the Marlboros they were — when they came out, they were in a red and gold pack?

A. I think so.

Q. Did he buy the packs or did you buy the cartons or how was it that you got the cigarettes?

A. Well, in our early years, I bought cigarettes with the groceries when I'd go grocery shopping, so I would buy them by the carton.

Q. What I would like to do is to kind of give the jury as we go through this today an idea of what amount of cigarettes he smoked back in the '50s. And you know, to the extent that you can tell them, and I don't mean exactly, but to the extent that you can, when the Marlboro — when he first started to smoke the Marlboros, how many cigarettes a day was he smoking or how many packs a day?

A. He was smoking about a pack a day.

Q. And just to kind of look forward for a minute, did that amount change over time?

* * *

[Tr. 38] and peritonitis by the time he went to the Portland School District?

A. Oh, yes.

Q. Okay. And was that in about 1980 or somewhere in there?

A. Yeah, around 1982 or somewhere like that, he started working for the School District.

Q. So was it — would it be fair to say that during that time period the appendix and peritonitis were not health problems for him?

A. There was quite a few years before he started in the School District. They weren't a problem anymore.

Q. Okay. And did the family live in Portland this entire time?

A. Yes, we always lived in Portland.

Q. And was it the Southeast/Northeast Portland area pretty much the whole time?

A. We lived in Southeast probably half of the time, and the other half in the Northeast.

Q. All right. Well, over the time when he was in the '60s and in the '70s, did he still smoke Marlboros or was he smoking some other brand?

A. He was smoking Marlboros. He smoked them

* * *

[Tr. 40] defense lawyers are going to ask you questions in a little while, and it isn't really an environment that maybe makes it easy to have a one-on-one conversation.

But I've had some conversations about what he said to you before, and that's an introduction to the question of, could you, please, as close as you can, give us the words that Jesse would say — Jesse would say when you would tell him that you thought he was smoking too much.

MR. DUMAS: Excuse me, Counsel. I apologize. A brief matter for the Court.

THE COURT: Sure.

(Sidebar conference between Court and counsel, off the record.)

BY MR. THOMAS:

Q. When Jesse Williams got to the point where you said anything negative about cigarettes and him smoking them, could you tell the jury what it was that you'd say, and what it was that he would say?

A. I would tell him, "Jesse, you smoke too much," you know. "It's is not good for you to [Tr. 41] smoke so much." and he would say to me, "Boy, forget it," or, you know, "It's not smoking too much." And later on when I found out and

discovered that from reading and watching the television and things like that, that tobacco was dangerous to your health, so I started telling him those things.

And that's when he would really get upset with me and say things like, "Oh, shut up, honey. You don't know what you're talking about," he says.

I would tell him such things like I said, "Well, you know that you hear what the Surgeon General says about smoking, that it's too bad for you, or you even hear other comments about it."

And he goes, "Well, the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." and he said, "The Government is always saying stuff about something, tobacco or something is going to cause you to have cancer."

And he said, "I don't believe it, because the tobacco company just would not do that."

[Tr. 42] Q. Now, what point was it that you began to say that you thought that he was smoking too much, and you wish he would quit, about when was it?

I want to give the jury kind of a bookmark, and then we're going to go forward in time and talk about how things developed.

A. The most part of the time started in the late '80s, and then in the '90s. That's when it got to be the worst part.

Q. Well, all right. Well, I want to go back to the '70s.

A. Okay. I started in the '70s telling him about it.

Q. Okay. Now, tell the jury about what level of smoking in terms of how many cigarettes a day was he smoking back in the '70s?

A. He started smoking around about a pack and a half a day and it gradually got to two packs. And then I'd say about ten years or eight years before he died, it was three packs.

Q. Okay. Now, let's go back to the '70s, because I'm going to try to stay with that for a minute. Did you ever, in the '70s, show him the warning label that was on the cigarette pack or read it to him?

[Tr. 43] A. No, I never did, but I told him about it.

Q. And what did he say when you showed him — or told him about it?

A. He would just go, "Phooey." You know — you know that's not — "This is what the Surgeon General says, it's not what tobacco company says."

Q. Did you ever talk to him about what the label actually said?

A. Yeah. Back in the '70s, it said that it was dangerous — it could be dangerous to your health.

Q. And what did he say about that?

A. He would say things — he would get angry about — he goes, like, "Well, I been smoking these many years and blah, blah, blah, and it hasn't hurt me yet. I'm not sick or anything yet, so what are you talking about?"

Q. Was he the kind of person who got irritated that fast, that quickly, about other things besides cigarettes?

A. No. Our most arguments were about cigarettes. That's the most arguments, because as the years went by, I got so that I just hated cigarettes, and I thought that cigarettes was taking the place of some of my time with him, [Tr. 44] because he spent so much time smoking that he had to, you know, interrupt our pleasure times together to take a smoke.

And I would just, you know, would be always upset, and so I would jump on him about it. So he would get angry, he'd walk out and all those type of things.

Q. Now, you said something that I want to go back to: "Take a smoke." Where did that term come from?

A. That's what he would do whenever he — like we — whatever we were doing, you know, like even if the kids came over, this is after the kids got grown up.

Q. And I want to stay back in the '70s?

A. Okay. All right. Well, whatever we were doing, and whatever we'd do, and he had a time he would have to smoke. He would just say, "I got to have — I got to take a smoke. I got to go out and take a smoke."

Q. And if the family was involved in a fun activity, or in a not-fun activity, would he leave whatever was being done to go out and take a smoke or have a smoke?

A. Yes. He would cut the games. We used to [Tr. 45] play lots of games and things like that. And he would cut the game short to go take a smoke. Or when we — we would go fishing a lot. He would do that, you know. He would smoke while he was fishing.

And my thought — I had a thought it just — I can't think about some things that we did together, that he would start to smoke. It was just — it is upsetting to me to think about it.

Q. All right. I'm sorry to do that.

A. Okay.

Q. I've got to ask you about these things, though. You know that?

A. Yeah. Well, it's just something there that, you know, it kind of upset me to think about it.

Q. Okay. Are you okay to keep going?

A. Yes.

Q. All right. When was it that he began to, if ever, talk about quitting smoking cigarettes?

A. He starting talking about it in the '70s, you know. He would say he would quit, you know. He didn't — he wasn't committing himself to right there about quitting, but he would say that he was [Tr. 46] going to quit or he would try to quit, and then sometimes he did.

Q. All right. Now, what I want to do, and again, we're going to try to stay in the '70s. As near as you can, tell the jury what it was that he would try to do to quit and how it would go?

A. Well, when he — when he was first starting to try to quit, he would try smoking the cigarettes that are supposed to have less tobacco or nicotine in it or whatever that was causing people to have health problems. Like he would smoke the Marlboro Lights, or something like that.

Q. All right. Now, did he buy the Marlboro Lights when they became available, the ones in the gold and the white pack?

A. Yes.

Q. And the pack that you got me was the Marlboro Light 100s. Those are the long ones. Are those the ones that —

A. Yeah, he liked the long ones better.

Q. Okay. And so one way that he did it was to smoke cigarettes that were supposedly the lighter cigarettes?

A. Yes.

Q. Did he still — did he try to smoke fewer [Tr. 47] cigarettes?

A. Yeah, he tried to cut down on cigarette smoking.

Q. Tell the jury what would happen when he tried to cut down on cigarettes.

A. Well, it wouldn't last very long, you now, he — oh, like sometimes he would tell me, "Honey, today I only smoked three cigarettes," and then maybe tomorrow, like, if he had started, "Well, I only smoked five today." And I said, "Well, honey, you're not getting better; you're getting worse again." And then before the week is over, he was back smoking the same amount.

Q. And would you say when that happened?

A. Yeah. I would ask him, "Well, what's your problem? I mean, why can't you — why don't you just stop, you know? Why did you start back?"

And he'd go, "Well, it's hard, honey," he said, "It's very hard. I just, you know, I just can't." And he would always be nervous and irritable, and so that's why he was smoking.

Sometimes he would yell at me a lot. And then he would say — and then he apologized, and he would say, "Well, honey, I'm sorry, but you know, I need a cigarette." Or, "I have to smoke."

[Tr. 48] And then, you know, and then, "I don't mean to be mean to you, but I just get like this sometimes when I have to have cigarette."

Q. All right. Now, I would like to go a little bit back to the '60s to television. We heard some testimony about television. What kind of television shows did Jesse Williams like to watch?

A. The earlier shows, we liked — he watched — we both liked to watch them. We watched shows together mostly, but we watched, like, Dr. Ben —

Q. Casey?

A. — Casey, yeah, and Dr. Kildare. Saturday Night Live.

Q. Did he like —

A. Cowboys. He loved the cowboys. That was his show, when it comes to cowboy movies coming on, he watched those.

Q. Did he watch the weekly cowboy movies like Rawhide?

A. Oh, yeah. And there was a couple of other ones back then. I can't remember the names of them, like maybe Maverick, or something like that, The Virginian, those type shows.

[Tr. 49] Q. Okay. And as far as his interest in sports through the '70s, did he continue to be interested in sports?

A. Yes, he did, always.

Q. Did you in the '70s and the '80s just give up on having him quit or did you keep the pressure on him?

A. No, it got worse. The arguments, the pressure, the temper tantrums that he would have, all those things got worse.

Q. All right. What I'd like to do is to give the jury kind of a bird's eye view of what would happen when you would have a conversation about cigarettes with him, what he would say and what you would say.

Now, you told us some things, so I don't want to go back and start all over again, but as time went on, what kind of things would you say to him and what would he say back?

A. Well, it — the arguments were basically the same. The stands was basically the same, you know. Like he didn't believe that cigarettes was harming him and I believed that they were. And I kept telling him this.

And he would get angry and storm out, or [Tr. 50] swear at me sometimes and give all kind of excuses to why the cigarettes wasn't harming him.

Q. Did he sometimes show you things from the paper to show that there was not sufficient proof about cigarettes being bad for you?

A. No. He never did show me anything from the paper, but he had quoted some things to me that he had heard tobacco companies saying, that tobacco was not addictive. He told me that.

And he would say, "Well, honey, you see I told you this — I told you that tobacco wasn't — cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer."

Q. Well, was he in a position where when you had a discussion about it, it was kind of like a conversation where his mind wasn't made up?

A. To stop smoking?

Q. Well, about whether — what he heard was correct or not; in other words, was he completely open minded about it or did he have his mind made up?

A. Oh, he was — he just thought that was the truth. He believed it. That was Jesse. Once he got an idea or belief in something, it was [Tr. 51] very hard to change, and he just did not believe it. It would have to be proven to him, in fact, to change his idea once he got an idea, or he got a belief in something. You couldn't just tell him or show him. It had to be proven, literally proven, to him.

Q. What about the '80s? You said that in the '80s that he went up to — I think you said three packs a day, two to three?

A. Well, it was about — it was about the late — the late '80s or middle '80s.

Q. And is that when he was smoking the Marlboro Light cigarettes?

A. Uh-huh, yeah. That's when he was smoking them more then. He was almost smoking them — for a while there, he was smoking them all the time, you know, like most of the times.

Q. How often would he try to quit or slow down?

A. Uh —

Q. And by this I mean in the '80s?

A. In the '80s, he tried more frequently in the '80s to stop — trying to stop smoking. And then in the late '90s, the he did before, because there was aid to help him, like gum or patches, [Tr. 52] and he tried those things.

And he even talked about getting — being hypnotized to try to stop, but he never did — I don't think he ever got that far. But he, you know, he talked about it. He would go cold turkey at times.

Q. Tell the jury about what it was like when he went cold turkey.

A. It was horrible. He didn't eat very much, and he would be so angry just all the time, like, I didn't have very much to say to him or talk to him, because he would be too angry to talk to him about smoking.

In fact, he had — well, you know, our conversation would end pretty soon, because he is going to be storming out of the house or just be very angry with me.

Q. And then when he went back to smoking again, would be go back to his usual behavior?

A. Yeah.

Q. Did he ever have in the family a child who was smoking and he let them know about whether he thought they should smoke or not?

A. Yeah, when they — when they were young. Calvin was the one when he was a young teenager, [Tr. 53] maybe about 14 years old, he caught him smoking once, and he just got a broom or something, and he just chased him out.

I remember, I was at the beauty salon. It was kind of terrible and also funny, because Calvin come running down wanting to know where I was. He was scared do death of his dad. He came running and he said, "Mama, Daddy is going to hit me with the broom."

And I go, "Well, why was he going to do this to you?

"I was smoking. Me and Nano (ph) was smoking and he got the broom, and he was really going to hit me with the broom."

Q. So he made an escape?

A. Yeah.

Q. And Calvin was the baby of the family, right?

A. Yeah.

Q. Okay. In the '80s, did he begin to get like a smoker's cough?

A. Yes, very, very bad.

Q. And would it be something where he would be clearing his throat a lot or how would that be?

A. Well, he did — he cleared his throat a [Tr. 54] lot, but he got so he would just cough. He coughed all the time. I mean, he would cough — he would cough so badly until I was — I was scared, you know, he was going to die from the coughing. That's how bad his cough would get.

And then that's when I would start sending him to the doctors. And that's when he started going to Dr. Kern and — to get medication, because he would cough so much. And then he would wheeze a lot.

And he would spit up, not just blood, but it would be — I mean, terrible-looking stuff, all black and greenish stuff. He was always spitting that stuff up at night. And he would spit up, almost as much as a half a cup of this stuff like that, and it was really frightful to me.

But when he went to the doctor, that's why — he never, you know, I don't think he ever told the doctor the extent of his coughing and the problems, because the doctors would only give him — they would send him back, and he would say, I asked him "Honey, what did the doctor say?"

And I knew there had to be something terribly wrong with him. He would say, "Oh, they didn't say much. He didn't say much. He said I [Tr. 55] was okay. I just have a little cold." And this is the type of way he accepted it.

Q. Was this the time when he would have what's been called the chronic bronchitis where he would have the upset chest cold and that?

A. That was during the time, yes.

Q. Did you go through times with him where he was sad about being unable to quit smoking cigarettes?

MR. DUMAS: Objection.

MR. THOMAS: I'm sorry. Let me finish my question and maybe I can avoid the objection.

MR. DUMAS: Thank you.

BY MR. THOMAS:

Q. Before he got diagnosed, were there times when he was sad about being unable to quit smoking?

A. Yes.

Q. Tell the jury what he would say when he was sad about that.

A. He would just say, "Well, I wish that I could stop." Because I would be telling him the things that's going to happen to him, that you are going to cough yourself to death.

And that, you know, "Well Honey, you're [Tr. 56] killing yourself, and not only are you killing yourself, you're harming me," because I had to go to the doctors I don't know how many times for eye infections, and that was the date the doctors told me that it was due to the effects of smoke from the cigarettes.

And so I would complain about these things, and he would feel bad about it. He said, "Honey, you know I don't want to do anything to harm you. I wouldn't try to do it intentionally, but I just, you know, I just can't stop smoking."

Q. Did he begin smoking outside?

A. Yes, he did.

Q. Was that partly at least to avoid having you have bad health effects from it?

A. Yes. He first began smoking — we always went someplace together. We was always on the road. And he first started smoking — stopped smoking in the car.

And then we would go where he'd have to pull over to get out to take a cigarette, you know, to smoke. And so we — and he would do this so often on our trips that we would take — so I started telling him to designate a place where we were going to stop, you know, so he wouldn't have [Tr. 57] to just get out on the side of the road to smoke. And so we would stop at different places and go in so he could have a smoke.

And then later it got, you know, that we were — it was just really bad in the house. And he would go in the basement and try to smoke there, but the smoke would still come up through the vents. And it would make the house smell and it was just terrible. So I'd keep, you know, on him, and so he finally ended up going outside.

Q. And I'd like to talk with you about some things that happened with Jesse Williams and cigarettes. Sometimes when he would cough in the night, would it wake him up?

A. Definitely.

Q. And if he got woken up, would he be able to take a drink of water or something and go back to sleep right away?

A. No. Jesse would wake up coughing so hard, it would just make me almost go into tears now, but I won't. He would —

Q. Do you want to take a minute?

A. Yes.

Q. All right.

A. Just a second. He would wake up coughing [Tr. 58] so hard, and then instead of him taking a drink of water and going back to sleep or something, he would get up, put his robe on, go out in the cold and smoke the cigarettes.

THE COURT: Would this be a good time for the afternoon recess?

MR. THOMAS: Yes, ma'am.

THE COURT: Let's take 15 minutes.

Leave your notes here, please. Don't discuss the case and watch your step coming out.

(Whereupon, the following proceedings were held in open court, out of the presence of the jury:)

THE WITNESS: I'm sorry.

THE COURT: It's okay. People expect it's going to be hard, and you don't need to apologize to people. You just let us know what we can do to help with it. All right?

THE WITNESS: Thank you.

MR. TAUMAN: Your Honor, I believe that at the end of the day, we will have some transcripts to deal with if we have the time.

* * *

[Tr. 71] before he stopped smoking — before he stopped smoking in the house, he would have it while he was in bed, as soon as he would wake up.

After he stopped smoking in the house, when he gets up, he takes a cigarette — a couple of cigarettes, in fact, and then he came back and washed up and then he would go out to have more cigarettes.

Q. When he would smoke the cigarettes outside, would anybody from the neighborhood join him or would he be out there by himself?

A. By himself, always.

Q. After he retired in '91, did he continue to try to quit smoking?

A. After he retired from the school district?

Q. Right.

A. Yes. That was during those years — that was the times when he tried most to try and stop smoking.

Q. I think we heard a reference to him getting Nicorette gum, the nicotine chewing gum.

A. Yes.

[Tr. 72] Q. Did he try that more than once?

A. Yes.

Q. What about patches? Did he try that?

A. Yes, he tried that, too.

Q. Tell the jury how well those things worked for him when he tried to quit or slow down with those products?

A. Well, Jesse, he would — he would try for a day or so. And he would cut down a few cigarettes. And then sometimes, like, with the patches, he would, you know — I don't know the routine of how they worked because I can't remember, but he would smoke while he had the patches on sometimes. He would have the patch on, and he would still have to have a smoke with the patch on.

Q. Did he ever talk to you about it or did you talk to him about it?

A. Yeah, because I know that he was supposed to have the patch on, and I would see him smoking, and I would go, "Honey, didn't you put the patch on this morning?" So then he goes, "Yeah, I got it on," you know.

Q. And what about him being able to go along without a cigarette? What about that?

[Tr. 73] A. He couldn't. I mean he couldn't — because he would still be smoking, and he had it on.

Q. Did the time come when he quit using the gum or quit using the patches?

A. Yeah.

Q. Was there any conversation about that?

A. Yes.

Q. Tell the jury about that.

A. Oh, I would just be upset with him and tell him, you know, he should try harder. And that he should, you know

— maybe he could stop if he would try harder. And he said that he was trying as hard as he can, but he just can't stop. He wanted to. But he just couldn't. He said that, "You just don't understand, Honey. You don't understand." He would say that lots of times.

Q. "You just don't understand?"

A. Yeah.

Q. Okay. What I have done for the last couple of hours is to focus you and everybody on what I think you said was the biggest problem for

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[Tr. 77] period. And I didn't want any ashtrays in the house because they're filthy and just a mess.

So I would throw out the cigarette ashtrays, if he brought one home. Because he would sometimes just bring a cigarette ashtray home for himself to smoke because I didn't buy them.

So I would throw it out. And sometimes it would find its would find its way back into the kitchen, and I would throw it out again. And it found its way out in the garage. And that's finally where they stayed.

Q. Did you ever have a conversation with him about the word "addiction"?

A. Yeah.

Q. And can tell the jury about when it was?

A. Well, this is getting pretty close to before he got — it was during the '90s. And especially about around '94 or '95, '96. These are the times when I was really on him about it.

And I knew that they were addictive. And so I would tell him — I told him things. I would say things to him like, "You smoke like, you know, like those cocaine people.

That's just how you treat your cigarettes, like you are addicted [Tr. 78] to — like a drug addict or something."

That's what I would call him, and he would get awfully angry and say, "That's not true," and said "I've been smoking for like 40 years or 50 years." He didn't exaggerate the years that he smoked, "And I don't have nō nothing. I don't have no cancer. I don't have no heart problems, and I'm as strong as a younger man," and all that kind of stuff like that.

Q. So did he buy the addiction theory?

A. No, he did not.

Q. Okay. You see pictures of people in the ads smoking a cigarette almost — let me see that exhibit over there, that exhibit. Throw that over here one time.

You see these people in the ads. You see them smoking and it's kind of elegant. They kind of smoke, and it looks kind of cool.

When he smoked, did he smoke like that? Or did he smoke like these people that you see outside of the building where they are trying to quick, get as much as they can?

A. He was smoking like, you know, until his jaws sink in and hold it in for as long as he possibly could and then blow out.

[Tr. 79] Q. Did he take his time when he would sit out there or stand out there in the rain and just kind of take his time and smoke that cigarette and have a good time with it? Or did he smoke and get it done as quickly as he could?

A. He would smoke it like — he would just — sometimes he would take his time. Sometimes he would smoke it hurriedly because he smoked so hard that the cigarette would burn fast.

So he would smoke it hurriedly because if he is smoking real hard, it would burn fast. If it's not, well, he would sit

out there and sometimes he would smoke two or three and that's when he is taking his time because they don't burn — takes more time to burn.

Q. Now, when he would smoke a cigarette, did he smoke it where he would like smoke a cigarette and a couple hours later you would see him smoke another one?

A. No, not that long. He would smoke a cigarette and like chain smoke. He would smoke a cigarette, put it out, light up another one.

Q. Did he ever in your presence, to you or to the kids, talk about what the cigarette companies said about how dangerous cigarette [Tr. 80] smoking was?

A. Yeah. I would talk to him about it. The kids, they probably did, but it didn't happen around me as much. Sometimes, Jess, my second oldest son, he lived with us for about six years. About two years before Jesse died, he moved out again.

So he would talk to him about it. He even bought patches for him. He would leave — find magazines, get magazines, leave out the articles and tell his dad to read them. But I don't think his dad ever read them because the book would still be there and always as if it never had been moved. So — but he did that a lot.

Q. Would Jesse Williams Sr. ever came back with anything that believed about how dangerous the cigarettes were?

A. Jesse would try to bring something back. If he did bring something back, it would be something that is showing that cigarettes is not as dangerous.

Q. And I think I may asked have asked you this before, but I can't remember right now. Did he ever talk about other things causing cancer [Tr. 81] besides cigarettes?

A. Yeah.

Q. Tell the jury what he said about that.

A. When we were talking about the cigarettes causing cancer and that they are — it's addictive or that it is going to cause cancer, that's what we were talking about, he goes, "Well, everything is causing cancer. If you listen to the Government, everything you eat, drink, or whatever is causing cancer."

Q. Now, you said that he got to the point where he was coughing up a whole of phlegm —

A. Yeah.

Q. — or stuff?

A. Yes.

Q. When was it that that became a productive cough?

A. Yeah, it began after he started seeing Dr. Kern. It first began, not too bad by '91, because that's when I first got him to get Dr. Kern as a primary doctor.

And then he still did it, but it wasn't quite so bad. And he wouldn't go to him no more.

* * *

[Tr. 85] Williams about what that meant to him? I don't mean having cancer, but that it was caused by cigarettes.

A. Just that, you know, that he should have stopped smoking, and now he's got cancer. That's basically what I said to him.

Q. And what did he say back to you?

A. He was like angry. And he goes, like, "Yeah, well, those darn cigarette people finally did it. They were lying all the time."

Q. Did he indicate whether or not he had believed the things that they said about cigarettes and health; in other words, what the tobacco company had said?

A. No, not at that time, he didn't repeat about what they had said. But he said he was deceived by them. That's what he said, something to that measure. It was that, you know, they had — he was like blind or something. I don't know how he said it. I can't remember the exact words that he said, but it was like he had been portrayed.

Q. Did he talk to you about quitting smoking once he had the diagnosis?

[Tr. 86] A. He couldn't.

Q. Did he try?

A. No, he didn't try.

Q. Did the doctor tell you whether this was a disease that Jesse Williams was going to recover from when he had the cancer diagnosis?

A. No, they told him right away. First, when Dr. Segal told him that he had cancer, he explained to us that he might live only six months, if he didn't have treatments.

So then he made — he made an appointment with Dr. Turner, and we went to him. And he explained that if he did have the treatments, chemo treatments and radiation, that he might be able to live two years. But that's the extent of his life that he might have after he had those treatments.

Q. Did the doctors tell him that he could have surgery and that they could cut a tumor out and make it so that he didn't have any cancer?

A. No, that's what they told us. That he could not have — because we asked — we had a whole slew of questions to ask them. And that was one of the questions. And they said

no, they couldn't operate because the cancer was too close to his heart to cut — to take it out.

* * *

[Tr. 101] didn't use the word, but I jotted down "stubborn," that I may not be the right word. You said that when Jesse made up his mind, that's the way it was, for him anyway?

A. Yes.

Q. So he himself was a strong man, an independent thinker?

A. Yes.

Q. A guy who made up his own mind about what was right or wrong or what was good or bad for him?

A. Yeah.

Q. Did you talk to your children, you and your husband, as they were going up, about the importance of trying your best to lead a healthy lifestyle?

A. Yes, we did.

Q. And, of course, you taught them not to drink excessively and to eat good foods and do what was right to grow up strong?

A. Right.

[Tr. 102] Q. And that included — you told us a little story about Calvin and the broomstick. You and your husband worked on teaching your children not to smoke cigarettes?

A. Right.

Q. And I think you indicated that your husband told them that it was a bad habit smoking cigarettes, and that it was bad for their health?

A. No, I didn't say that. But he did tell them it was a bad habit.

Q. Okay. When Mr. Williams was in Japan for a while, before he went to the Korean conflict, when he came back, he taught himself a little Japanese, right?

A. Yeah, he speaks some Japanese when he came back.

Q. And he liked to speak Japanese with Joanne?

A. With the kids, right.

Q. In the conflict in Korea, as I recall, you indicated that he was a truck driver, isn't that right, for the artillery group there?

A. Yeah.

Q. And he wasn't actually in combat, but he was pretty close to it?

A. Yeah, he was very close.

Q. You talked quite a bit about your husband here today.

I wanted to ask you a couple of other

* * *

[Tr. 121] Q. You didn't?

A. Not at — not at that time, not so much.

Q. Did you show Mr. Williams the warnings on the cigarette packs? Did you point them out to him?

A. No, I've never pointed them out to him.

Q. You never did that?

A. No.

Q. I ask if you recall this questions and this answer, Mrs. Williams?

MR. DUMAS: Page 7 — line 12, Counsel.

"Q. You testified earlier that there were times that you would call your husband's cigarettes cancer sticks. when did you do that?

"Answer: Oh, there would be times, like he would be smoking, like you asked me previously, about did we see the signs on the cigarettes, the warning signs on the smoking tobacco. I would show those to him and tease him and say, like, quote, 'That's okay. You go on and keep on smoking that cancer cigarette.'

"And then he would go, 'Okay, yeah, you know, the tobacco companies, don't even say they're cancer sticks, so I can smoke them.'

"And I said, 'Read the slogan on there

* * *

[Tr. 126] didn't he?

A. Yes.

Q. He also liked to watch TV?

A. Yes.

Q. And that would includes the evening news?

A. Yes.

Q. And he was the kind of man who liked to listen to — what do you call that — talk radio in the car?

A. Yes.

Q. Where they talk about current events?

A. I don't know. He had on a station where they would just be talking on the radio. I didn't pay much attention to it.

Q. Okay. I understand that he also read Consumer Reports magazine; is that right?

A. Yeah, he had read it some.

Q. Do you recall when the kids were growing up they would come home from school after they had been taught things in school about smoking and health, and they would — they'd come home, and they would ask Mr. Williams to quit smoking?

A. No, I don't remember that.

Q. They never did that?

A. I don't remember them doing it. [Tr. 127]

Q. Again, I am going to refer you to the interview that you had with Dr. Resnick with Mr. Tauman present.

MR. DUMAS: Page 7, Counsel.

BY MR. DUMAS

Q. "Question: Did the kids ask him to stop"

"Answer: No, he just stopped.

"Question: Did the kids ask him to stop smoking?

"Answer: Oh, yes, they did.

"Question: I know in school kind of early on, they did a lot of education about smoking. I don't know about when you were in school, but a lot of times kids came home to tell their moms and dads they'd want them to stop.

Did you recall your daughter being present there and answering, saying, quote, "We did that all the time. Please stop smoking. It was killing him and it was so stinky and it bothered mom and was making her sick, and, you know, stop."

A. I don't remember that.

Q. You don't? Okay.

MR. THOMAS: I am going to object to

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[Vol. 13-B] [Testimony of Gerald Segal (Mar. 10, 1999)]

* * *

[Tr. 20] Q. What did you find about that?

A. That the patient had smoked two packs of cigarettes per day for the past 45 years, for the 45 years before the visit.

Q. Okay. Just while we're on that subject of his smoking habit, project forward over the next basically five months and a day that he lived. Do you know whether Jesse Williams ever was able to quit smoking?

A. I don't believe that he was able to quit.

Q. Turning to another issue, did you make an observation or a record of a history of weight loss?

A. Yes, I did.

Q. What did you understand to be the case about weight loss?

A. He stated that he had lost approximately 27 pounds in weight over the preceding six months.

Q. Is weight loss in this context a significant clinical sign of the cancer?

A. Yes, it is.

Q. Do you have — would you characterize weight loss in the context of what was the first sign or symptom of this cancer? I guess I'm asking you to look through the retrospective

* * *

[Tr. 83] Q. And when Dr. Turner reports that he took multiple biopsies — is that what his report says?

A. I would need to look at it, but usually they do take multiple biopsies.

Q. I'll read from Page 482 of Exhibit 164. "Following inspection of the airways, multiple biopsies were obtained and submitted for histology." Histology means the biopsy is sent to a pathologist to look at it under a microscope?

A. Yes, that's correct.

Q. As you understand what is done in a bronchoscopy procedure and what Dr. Turner did here, is there any question in your mind that Dr. Turner visualized the tumor and took pieces of it with an instrument?

A. No question.

Q. Do you have any reason to be concerned in this case about a possible misdiagnosis because he didn't have tissue from the right place?

A. No.

Q. Did Jesse Williams ever have signs or symptoms of cancer in any other part of his body besides his lungs?

A. No.

Q. Now, there was some discussion about

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[Vol. 14-B] [Oral Argument — Defendant's Motion for a Directed Verdict (Mar. 11, 1999)]

* * *

[Tr. 102] on this issue was fairly well set up. This issue was addressed on summary judgment. We said from the outset, of course, we cannot point to an individual misrepresentation, a specific time in October in 1968, when somebody from the Tobacco Institute went on the television and said "X" and Jesse Williams remembered that one statement, et cetera. That would be absurd; we would never claim it.

This is about as far from a standard fraud case as you can possibly imagine. Defendant's contention amounts to the assertion that if you repeat something often enough and if the strategy is long term and complex and successful enough, then the plaintiff is out of luck, he has got no cause of action.

Because there were so many misrepresentations, so many attempts to create false impressions, that plaintiff cannot now point to one, or his widow cannot now point to one. Obviously, we're not relying on an individual misrepresentation. We think that issue was decided on summary judgment before trial.

In any event, what happened here is what the Florida Court called in the American Tobacco [Tr. 103] case, "A fraud on the American public." There are very specific false statements. The statement in the Frank Statement, "We accept the public health as a basic responsibility paramount to every other consideration in our business."

That was a false statement of their turn of mind, what they intended, what they were trying to do. If you believe the evidence that the plaintiff put on as to why CTR was set up, to create an impression that they were looking for answers, to create, in their own words, the Tobacco Institute's own words, as false controversy, the idea that there was a controversy here without actually denying the charge.

To do what vice-president George Weissman told CEO Cullman they should do right after the 1964 Surgeon General's Report, "We've got to come up with something to give them a crutch, to give smokers a self rationalization to keep them smoking."

This was a sophisticated combination of the addictive properties of nicotine and to offer rationalizations to the addict, so the

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[Tr. 109] So I will say, Mr. Randles, to say there is no evidence in the record on what Mr. Williams relied, I think I have to take issue with that, because there is evidence that Mrs. Williams said he felt betrayed and felt deceived and that he had told her on occasions that — to the effect that he was relying on the tobacco company, because they wouldn't be marketing an unsafe product.

There is some evidence about what his mental state was relative to representations generally. There is also evidence that Philip Morris was a member of the various incarnations of the public relations entities, and to that extent, CTR or TI or TIRC made statements that can be attributed to Philip Morris.

So the fact that there isn't a particular misrepresentation directly associated with Philip Morris, I don't think that is necessarily fatal, but the rule, rather than of the theory, is, I think as both sides recognize, something new.

We haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one. What has happened elsewhere in

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[Vol. 15-A] [Testimony of Glenn May (Mar. 12, 1999)]

* * *

[Tr. 68] residents of Oregon about the health risks of smoking?

A. I have.

Q. And again, we'll break it down by time period, but in general, what is your opinion?

A. Well, my opinion is that knowledge about the dangers, the hazards of cigarette smoking were so routinely discussed, so ingrained, so much reinforced by every form of human communication that the common knowledge of Oregonians was that cigarette smoking was dangerous, indeed so dangerous it could kill you.

And along the same lines, that the common knowledge of Oregonians, for the same reasons, was that tobacco was addictive.

Q. And Professor May, briefly — and the jury's heard some of this before, so if we could just cover it very briefly —

A. Sure.

Q. — I'd like for you to tell them about how tobacco and cigarettes came to be a part of American culture, and if we could, could we start with Columbus?

A. Uh-huh, sure. Well, okay. Columbus.

Europeans first came into contact with tobacco — it's a New World crop — as a result of Columbus's explorations. The first reference we have in European literature to tobacco actually comes from

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[Tr. 97] of smoking?

A. I did.

Q. And you already listed the types of magazines you reviewed.

A. Yes.

Q. There are one or two I'd like to talk about just briefly with the jury.

You mentioned you noted Reader's Digest. Now, is there anything unique about Reader's Digest in the universe of magazines, if you will?

A. Well, it's one of the most popular, indeed, for much of the century, of the most popular magazines. It also, by the way, didn't accept advertising till 1955. But one other thing that I should mention, at least in passing, is it's one of these magazines which, I don't know, we might say has a pass on-readership.

I don't know that your experience was, but because I'm somewhat older, I'm sure, than everyone here, but, you know, in waiting rooms, doctor's waiting rooms, anybody's waiting room, you find copies of Reader's Digest, you'd read it. You'd find it on coffee tables and so on, and so the point is that more than one person who's a subscriber, typically, will read Reader's Digest."

That was my experience. I used to go to my [Tr. 98] aunt's house on weekends and pick up Reader's Digest.

Q. Professor May, did Reader's Digest at any point in time ever accept tobacco advertising.

A. No, no.

Q. Did Reader's Digest have any viewpoint on tobacco?

A. Oh, yes. Really started in 1924, with an article by Irving Fisher, Professor from Yale University in economics, and a major figure in the anti-smoking movement, they were more or less conducting a crusade against smoking, driving

home the point that it was dangerous, that it could kill you, that it was addictive. And in some — there are more than a hundred fifty such articles up to 1987.

Q. Did you bring a few just representative samples for the jury?

A. Yes.

Q. Now, the articles we're about to show from Reader's Digest again, is this — does this represent the universe of articles in Reader's Digest about smoking, or is this a sample?

A. No, this is just a sample.

Here's one — there are a good number of the states from the '30s, I believe, there are a good number of articles from this, "So You're Going To Stop Smoking," [Tr. 99] by people who are ex-smokers trying to tell them, give them hints, help in trying to get off the habit, also conveying the message that it's addictive, and always along the way saying how harmful it is to you. That's why they want to get off it.

MR.RANDLES: And, Your Honor, if I could just note for the jury — I won't do this with each of these, but most of these articles that will be shown are defense exhibits, and the jury will be provided with them.

THE COURT: Okay.

THE WITNESS: Okay.

Q. (BY MR. RANDLES) Is this another example?

A. Yes, another of that same type, "Are You Man or a Smoke Stack," by an ex smoker.

Q. Did Reader's Digest also cover reports about the research concerning smoking?

A. Oh, yes, extensively. In fact, and they commissioned their own reports. Mostly Reader's Digest reprinted things

from other magazines, but they did commission — and this is on the smoking issue — in particular studies by, I think, people to deal with the smoking issue.

Q. Is this an example, Professor, this December, 1952 article, "Cancer By The Carton"?

A. This is actually a reprint from another [Tr. 100] publication. It's a very famous article, apparently had quite a substantial impact, "Cancer By The Carton" by Raynor. It only actually is two pages long. Maybe that's part of the reason it had such an impact.

And, by the way, there's evidence in The Oregonian that they were out of advertisements — I didn't realize this, but I learned it from my research, The Oregonian would every once in a while advertise — or the Reader's Digest would advertise in The Oregonian, telling you there would be an upcoming article, and what it would be about, and more often than not it would be about smoking.

Q. Briefly, before we get off of this article, would it be fair to characterize this as a very famous article?

A. I think so.

Q. Why is that?

A. Well, for one, it came at a time when there were increasing numbers of scientific studies that were pointing out that much of what people had in their heads already from common knowledge was indeed true, scientifically true, or suggesting that it was scientifically true.

Lots of studies were coming out in this period, and this helped to popularize — remember, you're talking about a magazine that has a circulation in the U.S. in [Tr. 101] the range of 10 million ballpark, 10 million in that time period — with a pass on readership considerable — how much it would be one doesn't know for sure. I've heard the figure 10 readers for every one copy, that sounds a bit high to me, but it

was, trust me, in all these waiting rooms. So this had a huge, huge impact.

Q. Just briefly, do we have some other examples of continued reporting on this subject over time by Reader's Digest?

A. Oh, yes, we do. "Can the Poisons of Cigarettes be Avoided?" This was one questioning to what extent it may be possible to using filters to lessen your chances of getting killed in effect.

Q. Is the date on that 1953, Professor?

A. Yes.

Q. Is this example from 1962, the same type of article?

A. Well, it is. It's about — actually, it's British research. In some ways the British were slightly ahead of the U.S. in making a governmental determination about the link between lung cancer and smoking, at least officially. And this is reporting actually a decision by the British government in '62 to come down against cigarettes, and officially making the link between lung cancer and cigarettes.

[Tr. 102] Q. Did this type of coverage continue into the 1970s?

A. Oh, yes, and beyond, up to the present.

Q. Is this an example from 1976?

A. Yes, "Beware That Cigarette Cough." And we all know what that's like. I mean, I grew up in a household with a three-pack-a-day smoker. Anyhow, so you know what that's like early in the mornings. Pretty horrifying.

Q. And an example, from 19 — is this an example from 1989?

A. That's right. And the title says it all, "Scared Smokeless." Again, it's an effort to help readers get off the habit.

Q. You mentioned Stars & Stripes earlier.

A. Yes.

Q. Is that a newspaper given to people in the service?

A. That's right, by people in the service.

Q. Did you review Stars & Stripes and find some articles regarding the reporting on health risks during the period of time Mr. Williams was in the service?

A. Right. And again, let me just point out Mr. Williams was in the service from '48, I think, to '52, '52 or '53, but I think '52, thereabouts.

Q. Without particularly going into the text of the articles, let's just talk about whether there was a general [Tr. 103] coverage of the matter. Is this a 1948 article?

A. Yes, that's right.

Q. What's the headline?

A. "Cigarettes Said Disease Cause."

Q. Is this a similar example in 1952?

A. That's correct.

Q. And what's this headline say there?

A. "Cancer Symptoms Found in Smoking Tests, Society Told."

Q. And is this another example from 1952?

A. Uh-huh. "Smoking Ups Lung Cancer, Study Shows," supporting the scientific tests that I was mentioning, scientific studies.

Q. Now, Professor, I want to move us forward in time a little bit, and we've talked about the pre 1950.

Now, I want to sort of bracket a period of time from 1950 to 1964.

A. Uh-huh.

Q. Picking 1964, because of the Surgeon General's report, did coverage of this issue, other than things we've already shown, continue during that time period?

A. Oh, yes.

Q. Was — and again, just briefly — were the links in the studies and the discussions about smoking covered on the television news?

[Tr. 104] A. They were.

Q. Was it a frequent subject on the television news?

A. Oh, reasonably frequent. There's certainly — and they were of course famous studies. I think people in journalism school are well aware of the work of Edward R.Murrow, one that was most famous. That's a two-part series going into the conflict about the lung cancer and cigarette risk.

Q. Now, briefly you mentioned earlier, briefly, educational films. This was a period of time in which they continued to put out those sorts of films?

A. Well, they really escalated in this period. Films had been used in schools, and I found many, in fact, from the 50s, because it was in the 50s when you first start seeing these films in any number.

Q. Was there a famous film during that time period called, "One in 20,000"?

A. That's right, there was. I think it was produced by the American Temperance Society.

Q. Was that shown in schools all over the country?

A. Yes. And actually there's evidence in some of my exhibits. I don't know if I brought it as an exhibit, but it was shown throughout Oregon.

Q. Can we talk — you mentioned Time Magazine earlier.

[Tr. 105] A. Yes.

Q. Did Time Magazine cover these issues during this time period?

A. Oh, extensively.

Q. Is there any evidence in this case as to whether Mr. Williams was a reader of Time Magazine?

A. That's right. Depositions indicated he read Time Magazine, Reader's Digest, and Life — yeah, Life Magazine, Oregonian, Skanner.

Q. Is this an example from 1952 of coverage in Time Magazine?

A. Yeah, "How to Stop Smoking," again conveying the point that it's a tough habit to break.

Q. Is this another example from 1952?

A. Uh-huh.

Q. Could you read the caption at the top, Professor, which I don't think the jury can see.

A. "Smoking and Cancer."

Q. Did that become a semi-regular feature in Time, the "Smoking and Cancer" headline?

A. That's right. It was either "Smoking and Cancer," sometimes it would be, "Smoking and Cancer Continued." That's how often it was, in fact, covered in Time Magazine.

Q. I think we may have an example of that, if I'm [Tr. 106] successful in calling it up.

Is that an example of the "Smoking and Cancer Continued"?

A. Yeah. There we go, "Smoking and Cancer Continued."

If I could, jut for a second, just — the historian in me has to interrupt the professor. This pictures, by the way, three major figures — actually, two major figures, and one other I could identify, in the scientific investigations concerning the link between smoking and illness and death.

This E. Kiler Hammond, he was really chief statistician for the American Cancer Society, the major player in the studies in the 1950s, particularly '54.

The first announcement that drew major attention to the statistical link — the scary statistical link between smoking and lung cancer was by E. Kiler Hammond.

That's Daniel Horne, who worked on the project with him — and I think we may have a quotation from him later — another respected scientist, and that's Charles Cameron, who is an executive in the American Cancer Society.

And this is a study about — an article, rather, about the research that they're revealing to the [Tr. 107] public about the scary link.

Q. And did that coverage in Time Magazine continue?

A. It did.

Q. And is this an example from 1956?

A. It is, yeah. It was pretty relentless, "Smoking and Cancer." Oh, yes, this is — is it '57? I can't see — it's a little bit blurry, I think.

Q. Would it be correct this is a Time Magazine from June 17th, 1957?

A. Yes, that's right. Remember, I talked about this American Cancer Society study, and this was really the final report. American Cancer Society did a study of 188,000 people, and trying to determine what was the risk they had, if

they were smoking, of contracting lung cancer, but also they studied heart disease, and as well mortality — and these are the tables that talk about — scary.

These suggest that if you smoke, chances were you lived something like eight years less than anybody else. So that's Time Magazine.

Q. And is this another example from 1959 of their coverage?

A. Right. Yes, that's right. "Smoking and Cancer Continued." You know, let me point out just as an aside, Time Magazine took cigarette advertising, and yet [Tr. 108] they're reporting this. In any event, that's just an aside.

Q. Is this another example from '59 from that same series, "Smoking and Cancer"?

A. "Smoking and Cancer Continued." I guess you're getting the point.

Q. To change subjects to another magazine that you referred to earlier, did Life Magazine cover smoking and health issues?

A. Oh, my, of course it's the same publishing house, it's Henry Luce, and they certainly did.

Here's a Life Magazine, December, '53. That's the year the famous mouse painting study was done. I don't know if you have seen any of those.

Q. I'm sorry. I didn't mean to talk over you, Professor.

Is this the article inside that same magazine?

A. That's right. You have the mad scientist over here. In any event, this, in order to get extracts from cigarettes, they would — they had to invent these cigarette-smoking machines which would get tar, in effect, and then they painted them on the backs of mice.

I'm glad you can't see it too close because it's pretty grisly — and as it happened, in these experiments, these tests, the principal player was Ernest [Tr. 109] Winder. They were able to produce, in the laboratory, cancer in these mice. And that was seen as an important breakthrough, because remember, scientific standards of proof are higher than most of ours.

So it was deemed to be very, very important to produce in the laboratory a cancer, and this was seen as a major breakthrough, and it caused a great furor when they did this study.

Q. Did the coverage in Life continue? Is this an example from 1952?

A. That's right. Somewhat humorous, but, again, it's not a humorous subject by any means. "How Do I Swear Off Smoking?" And here you have the coffin nail, showing you what the consequences are if you don't stop smoking, but then these people are going through all sorts of horrible contortions, you know, in order to get off this awful habit, so cutting off their arm, and hanging themselves, and so forth.

Q. Professor May, there's been some suggestion in this case that because cigarette companies were big advertisers in certain magazines, that that somehow depressed or interfered with coverage of smoking risks in the popular press. Do you agree with that?

A. Oh, no, not at all.

Q. What is your basis for disagreeing with that

* * *

[Tr. 115] A. That's correct.

Q. Have you seen any evidence in your research that Mr. Williams talked to his own children about the risks of smoking?

A. Oh, yes, I have.

Q. What evidence have you seen to that effect?

A. Well, I've seen it in depositions. I've seen, what, 15, 16, or so depositions which talk about it, and indicate he gave fairly strong signals to his children that smoking was bad for them.

There is — I'm not sure if I brought this as an exhibit or not — of a board, but there's a reference to his Mr. Williams chasing after — I believe it was Calvin Williams with a broom, and so, I mean, I think the message was quite clear.

Q. Professor, were there polls over time, public opinion polls, that talked about the risks of smoking and what the public perceived?

A. Yes, there were.

Q. Is this an example of the famous one from 1954?

A. Well, yeah. It's a pie chart reporting results, it's a June, '54 Gallup poll reporting 89.9 percent of the people sampled, 1400 and change, 1400 plus people were asked in that particular Gallup study, and and 89.9 percent of them had heard or read that smoking [Tr. 116] causes lung cancer.

Q. Now, Professor May, there's been some discussion of polls, and some criticism of polls in this case.

A. Uh-huh.

Q. I just want to be clear, are you basing your opinion in this case largely upon polling?

A. Oh, no, no, no. I have, I would say, sort of a healthy skepticism about polls. I'm not often sure what they mean. And you know, this is one of so much stuff that I've been looking at over time, so I can't exclude from my research polling data.

What's interesting about the polling data is that it does confirm what I've been telling you, that people were getting the inputs, they had heard or read that smoking caused lung cancer. It didn't mean everybody at this point was convinced — scientists weren't convinced.

This was 1954, and there was a debate, a real debate in the scientific community about the lung cancer/smoking connection, but the numbers do go up steadily, as one would expect, as more scientific evidence comes out, as scientists come to some stronger conclusions.

MR. RANDLES: Thank you, Professor.

Your Honor, may counsel and I approach for a

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[Vol. 15-B] [Testimony of Glenn May (Mar. 12, 1999)]

* * *

[Tr. 4] compared to what one might see today?

A. Oh, yes. Yes. Quite considerable difference, in that nowadays I think all of us are absolutely convinced that by the scientific evidence. Scientists, in my view, appear to agree that cigarette smoking causes lung cancer, so it is not any big news.

There are further studies. There are further studies that add some details to this picture that come out. They come up in the press. But it is not the big furor that it was in the '50s and '60s. The amount of coverage was pretty overwhelming on those particular issues having to do, above all, with cancer, heart disease, mortality. That's sort of news.

Q. Professor May, regarding the 1964 Surgeon General's Report, these jurors have heard a lot about it, so I don't think we need to get into the exact circumstances surrounding it.

But when the Surgeon General's Report came out in 1964 with its findings that cigarettes were causally linked to lung cancer in men, was it big news?

A. Oh, it was a big story, covered nationally, and it was a front page story. [Tr. 5] In the Oregonian, it was a first-page story. Around the world, really even beyond the U.S — the U.S. was a major player of all that, of the first-page story. Once more, throughout the month of January, it was covered again and again.

When one finds — I think — I found 30-plus stories in the month of January '64 having to do with the health risks of smoking. And in some years you might not have that many, as many as that, as 30-something-odd stories.

Q. Did you bring some examples for us of some of the coverage?

A. I did.

Q. With the Court's permission, would you step around by that screen?

THE COURT: Go ahead.

BY MR. RANDLES:

Q. I want to ask you if a couple of these are a couple of examples of the coverage?

A. That's definitely not the coverage.

Q. Perhaps not.

MR. RANDLES: With the Court's permission, I will let my more technological competent colleague look at the computer while I proceed. And we may come back to it.

[Tr. 6] Were there a number of stories in the popular press about the Surgeon General's Report throughout 1964?

A. Oh, yes, there were.

I can do this to music as well, apparently.

Q. There was some testimony in this case that it was maybe a big story for maybe a couple of days and then faded away. Would you agree with that assessment?

A. Oh, no, no. It was a huge story. I can't remember, I saw something recently, I don't know if it was in some magazine — People Magazine, or whatever — they were looking at the biggest stories of the past 50 years or so. This is one of the top 100. So it was big news. There was so many smokers. More than half adult Americans smoked. That's why it is big news.

Q. Let me offer you some examples. Can you tell me — here is one.

Is this a story in Time Magazine at the time discussing the Surgeon General's Report?

A. Yes, it is. I wish I could read the day. But Time went to bed — is that what they talk about in the news people? It goes to the — the [Tr. 7] press at a certain point, and as it went to the press, the story was just breaking. So it was about a week before Time covered it. It didn't mean that Time didn't think it was important. It had already gone to bed, gone to press.

In any event, it was a big story in Time Magazine. There was Surgeon General Luther Terry with a copy of the report — actually, you saw a copy of it before with the Counterblaste, and pictures like this appeared around the U.S. and around the world.

Q. Perhaps if you could just show a couple of examples from The Oregonian.

A. Yes. First page, "Report links cigarette use with cancer."

Q. Is this another example?

A. Yes. "It's official now: Cigarettes can kill you." That's later in the month, too. It is the 28th of January. So — and the message being sent was, "Now your government is telling you that it can kill you."

Q. In response to the Surgeon General's Report, was there an increase in anti-smoking organizations' activity levels in the state of Oregon?

[Tr. 8] A. Oh, yes, absolutely. There was just a mammoth amount of activity, as you might imagine. For example, school superintendents were telling teachers that they needed to get on the case right away. There were television shows about it, public television, but also regular television. Lots of organizations were popping up, anti-smoking clinics all over the place with lots of people streaming into them after seeing it being covered in the press.

Q. Have you seen any evidence that Mr. Williams was aware of the Surgeon General's Report in 1964?

A. Well, as I recall, in the deposition of Mrs. Williams, there is a reference to their discussing the Surgeon General's Report. I can't remember the exact wording.

Q. Did there come a time in 1966 when the law required warnings to be placed on packages of cigarettes?

A. That's correct, 1st of January, 1966.

Q. Do you have some examples of the warnings with you?

A. Yes, yes, I do.

Q. Was this the first warning that was put

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[Tr. 12] A. Yes. Actually, this comes from an article, Journal of the American Medical Association. But I think it is indicative of the extent to which people were aware of the danger. This is an AMA statement to the effect that "labeling of cigarettes will not alert even the young cigarette smoker to any risks of which he is not already aware."

Q. Was the date of that April 6, 1964?

A. That's right, yeah.

Q. Were there similar statements by authorities in the field during that time period?

A. Yes, absolutely. This is Daniel Horn. Remember his picture before, smoking a pipe along with E. Tyler Hammond. He was one of the major players in the research. He said in 1968, "You can stand on a rooftop and shout smoking is dangerous at the top of your lungs and you would not be telling anyone anything they didn't already know."

So the state of knowledge was considerable.

Q. Now, Professor May, we have shown the jurors a lot of newspaper headlines, and we won't belabor the point.

* * *

[Tr. 38] THE WITNESS: Thank you, Your Honor.

Well, with that proviso, I'm not a scientist, yes, I believe that smoking causes lung cancer.

BY MR. GAYLORD:

Q. And you came to that opinion by reviewing the material that you have reviewed?

A. No. I came to that opinion by living with an addicted smoker who died of smoking-related illness. My dad. And when you live in a family with an invalid, you — it has an impact on you.

Q. I'm sorry, but did you draw your own conclusions from that experience that that changed you personally in your view of your relationship between smoking and lung cancer?

A. I was a little child when my dad first had heart attacks, was told to get off smoking, the smoking, the coughs in the mornings. I woke up in the morning to my dad's smoking cough. It wasn't much of a — it wasn't very difficult for medical science reports to be convincing to me. I knew smoking was bad.

Q. And you may have already answered this within your other opinion, but do you believe that [Tr. 39] smoking cigarettes is addictive?

A. I do. My dad, in my view, was addicted.

Q. Do you find it a little ironic that Philip Morris, whose lawyers hired you to come here and express your opinions about common knowledge, denies to this day that cigarette smoking causes lung cancer or addiction?

A. Ironic? Well — I guess I don't. The answer to that, I'm not a big boy, and I do make a distinction between common knowledge and scientific knowledge. I'm not going to be — I don't view myself as a defender of Philip Morris. I am someone who tells you about the history.

In terms of the scientific side of things, I think it could be that what Philip Morris is denying, that in their view it is scientifically proven, that's — that's my reading of the situation. So I don't see great ironies, but others might.

Q. You don't think there is any inconsistency in Philip Morris' position between claiming that common knowledge knows these facts, while their position publicly is that they are not proven?

A. I don't. I don't. I do see a difference

* * *

[Tr. 46] or as well."

A. Uh-huh.

Q. And, as you pointed out earlier, if you were to ask your doctor or almost any older person about using tobacco, he would advise you to leave it alone.

A. Yes.

Q. Do you have any information about whether Jesse Williams and his family had a personal physician in the '40s in Crockett, Texas?

A. I don't, sir.

Q. The other textbook from that time period, Defendant's Exhibit 745, Health and Human Welfare. This is the one that I think you indicated was high school or junior high?

A. If I could see the title, I could tell you.

It is high school. It is "HS."

Q. And it was full of good information about tobacco products, including nicotine, "The alkaloid of tobacco considered a violent poison does not appear in tobacco smoke"?

A. Uh-huh.

Q. And this is real hard to read. "Observations by some of the world's best [Tr. 47] authorities." I don't think it can be focused any better. It is the way the original is.

"By some of the world's best authorities seem to indicate that a man may bring on one or the following disturbances to his body by heavy smoking: High blood pressure, rapid heart action, shortness of breath, palpitation of the heart, and pain in the region of the heart."

A. Uh-huh.

Q. And, like the other one, "Tobacco is injurious to the development of a boy, and therefore, does him permanent physical harm."

Then it goes on to say, "Smoking, even in moderation, is a handicap in athletics. Nonsmoking athletes show more consistent improvements than athletes who smoke and nonsmoking athletes are better disciplined and in other ways more helpful to a team than smokers."

A. Yeah. Right.

Q. So you are not suggesting that in the '40s anything came into the common knowledge that should have told any smoker or prospective smoker that they could get lung cancer from smoking cigarettes?

A. I would say that's a fair

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[Tr. 67] has been impossible to establish that the feelings persons have upon giving up smoking are anything but that which would be expected when one is frustrated by giving up any desired habit."

A. Uh-huh.

Q. You consider that, again, to be a statement contrary to common knowledge in 1988?

A. I do. I also don't — I'm not aware that it got to Oregon. I didn't see it.

Q. Okay. Well, let's see if we can find an example similar that we know got to Oregon.

Are you familiar at all with a document that — I will show one of the many versions of it available called "Facts you should know." This one happens to be enlarged from the New York Times, April 15, 1994.

A. Yeah.

Q. I will represent to you that the same document and the same words appeared in The Oregonian on the same date, all right?

A. Yes. It did appear in The Oregonian. I remember pulling it and putting it in a folder.

Q. You are familiar with the contents of this document?

A. Yeah.

[Tr. 68] Q. This document, as you know, says —

A. But actually I'm saying yes, but I don't know in detail. I know in general.

Q. All right. Well, if this document — I will just find some parts of it to read here.

"Philip Morris does not believe cigarette smoking is addictive." Are you familiar with that statement by Philip Morris in April of 1994?

A. Yes. That part of it, I recall.

Q. All right. And you recall that statement is directly contrary to what you have told this jury was common knowledge for years by that time?

A. Right. I guess back to my chart here, too. It is the one you are pointing me to. The distinction I have made from time to time is between — I will do the butcher block again, if you will. Common knowledge —

MR. GAYLORD: Could I have the question read back, please?

(The court reporter read as follows:)

"All right. And you recall that statement is directly contrary to what you have told this jury was common knowledge for years by that time?"

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[Vol. 15-B] [Testimony of Henry Williams (Mar. 12, 1999)]

* * *

[Tr. 115] Portland, Oregon in 1961, lived there until 1980.

Q. Okay. What was the cause of death of your mother?

A. My mother — I think she died of cancer.

Q. Was she a smoker?

A. No. She died of — it is a combination of cancer and pneumonia.

Q. What was the cause of death of your brother Freddy?

A. Cancer.

Q. Was Freddy a smoker?

A. Yes.

Q. Do you recall what type of cancer he died of?

A. I don't know the specific kind.

Q. You moved from Crockett in 1955 when you joined the military, right?

A. Yes.

Q. Did your mother discuss smoking with you prior to you joining the military?

A. Yes.

Q. Do you recall how much before?

A. Well, from childhood my mother — smoking was forbidden for any of the kids in our family.

Q. How did they tell you that smoking was [Tr. 116]forbidden, how did you know that?

A. "Don't smoke," that simple.

Q. Was it your mother or your father who would tell you?

A. My mother.

Q. Did she tell all the kids?

A. Yes.

Q. Did you hear her tell all the kids?

A. Yes.

Q. You heard her tell Jesse?

A. Yes.

Q. Do you recall when she told Jesse?

A. No, I don't recall when. It was an every-so-often thing, it was just —

Q. Was it while you were still living at home in Crockett?

A. Yes.

Q. Did she tell you why they were forbidden?

A. Yes. She said that they were harmful to you. She said that they would kill you.

Q. Did your father ever say anything to you about smoking?

A. No.

Q. Other than your mother telling you and hearing about the Surgeon General's Report, have

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[Vol. 18-B] [Testimony of Kenneth Ludmerer (Mar. 17, 1999)]

* * *

[Tr. 132] that were to be the case. You have got the world's scientific community going at this as one of the major scientific issues of the era. The United States, Britain, France, Germany, and other countries, teaching hospitals, Sloan—Kettering, National Institutes of Health. This is well-funded activity. The number of papers soars in the 1950s compared to the 1940s and 1930s by a multiple.

So the whole scientific community is going at this and coming up with results. And some results are positive, particularly the epidemiological studies. But the laboratory studies, as a generalization, tended to be negative.

Q. Let me ask you this: During this time period were there distinguished scientists outside the tobacco industry who did not believe that the statistical evidence had proven that cigarette smoking caused lung cancer in the 1950s and early 1960s?

A. What dates?

Q. From 1954 to 1964, were there distinguished scientists outside the tobacco industry that didn't believe that the statistics [Tr. 133] had proven smoking caused lung cancer?

A. There were distinguished scientists everywhere. This had very little to do with the tobacco industry. There were distinguished scientists who were willing to accept the epidemiological evidence, especially as the prospective studies began to be published. Then there were others who were equally respectable who were troubled by the negative biology, and this was a raging controversy in the late '50s and 1960s.

Q. Would you mind flipping the page and listing for the jury a few examples of some of the prominent scientists of

that time period who did not believe that statistics had proven that cigarette smoking caused lung cancer?

A. Who did not believe?

Q. Who did not accept the statistics as proof.

A. Which time period?

Q. 1954 to 1964.

A. Okay. Frank Horstall. Frank Horstall was the director of Memorial Sloan-Kettering Cancer Institute. Probably the most important private cancer institute in the United States. In [Tr. 134] 1962, Dr. Wynder has left Washington University, he is working at Sloan-Kettering. Dr. Horstall told Dr. Wynder —

MR. THOMAS: Objection, hearsay.

BY MR. HANDLES:

Q. Let's not go into the conversation.

A. He did not accept the tobacco hypothesis.

Q. What's another example of prominent scientists of the day?

A. Another would be Ronald Fisher.

Q. Who was Dr. Ronald Fisher?

A. Dr. Ronald Fisher was British and, in my view, he was by far the most distinguished scientist of all who was involved in the smoking health constituent.

Dr. Fisher was a great theoretical and statistical biologist. Earlier in his career, he had unified the discipline of genetics, the discipline of evolution, the so-called evolutionary synthesis, one of the great theoretical achievements of 20th century biology. He is a biologist like Einstein is to physics, a great theoretical master. And he was also a geneticist and he was very skeptical of the cigarette hypothesis.

[Tr. 135] Q. In the interest of time, let me ask you about one other name. Would you write Dr. Joseph Berkson up there and tell the jury who he was.

A. (Witness complies.) Joseph Berkson was at the Mayo Clinic. He was considered the dean of American biostatisticians. He, too, was troubled by the tobacco hypothesis. He did not feel that the statistical evidence warranted any conclusions about causality.

Q. Now, is this a list of all the scientists who did not believe the statistics had proven that cigarette smoking caused lung cancer during this period of time?

A. This is just a sampling.

Q. Were there many more?

A. Oh, there were lots.

Q. Let me ask you a question about 1957.

Was the question of whether smoking caused lung cancer resolved by 1957?

A. In the standards at the time?

Q. In the standards of 1957?

A. No, no. The prospective studies by 1957 had been published. And by 1957 you have some scientists who are much more concerned about cigarette smoking is the cause of lung cancer as

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[Vol. 19-B] [Testimony of Carl Fuhrman (Mar. 18, 1999)]

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[Tr. 21] Q. Doctor, I think this would be a good time to resume your seat.

A. Do you want to do the lungs?

Q. I'm sorry. How many do you want down?

JUROR SMITH: Before he resumes the seat, did he say where he first saw the 1991 part on the piece of lung thing?

THE COURT: Go ahead, Doctor.

JUROR SMITH: Can you show me on the exhibit?

THE WITNESS: She wants me to show where the tumor was on the original lateral projection in 1991. Is that correct?

If you remember, we said that the white line was obscured right above the origin of the right upper lobe bronchus. This is the right upper lobe bronchus. The tumor back then was right in this region, right over here.

JUROR SMITH: Okay. Thank you.

THE WITNESS: These are the same set of images displayed with lung windows. The lung windows allow us to look at the lung panoramically and allows us to look for pulmonary nodules, and there is no evidence of any pulmonary nodules in either the left or [Tr. 22] right lung.

I think you can really appreciate the narrowing of the right upper lobe bronchus here compared to the black branching structures which represent the left bronchi.

BY MR. SIRRIDGE:

Q. Just a couple of questions, here, Doctor.

Was Mr. Williams' tumor diagnosed in 1991?

A. No, it was not.

Q. Do you have an opinion as to why it may not have been diagnosed?

A. I think a finding on lateral projection is a subtle finding. I think most radiologists spend most of their time on the PA projection, and this finding was only apparent on the lateral projection as a subtle finding.

Q. And, Doctor, was Mr. Williams' cancer diagnosed in January or February of 1996?

A. No, it was not.

Q. Do you have an opinion as to why it may not have been diagnosed at this point?

A. It was not recognized.

Q. Thank you. Would you take your seat, Doctor.

* * *

[Vol. 22-B] [Oral Argument — Jury Instructions and Verdict Form (Mar. 23, 1999)]

* * *

[Tr. 55] in that case.

And the defendant had made the same argument below. I don't know why they didn't make it again for the Court of Appeals, but the doctor could not point to one specific thing.

I think the evidence is quite clear that defendant took a position as a part of a tobacco industry and occasionally on its own, and made statements that every juror could have repeated to do you before this case began.

What's the tobacco company's position? Either cigarettes don't cause cancer or those who are a little more sophisticated remember the half truth the way its said, which is, well, it's a risk factor, or , well, it's not proven, or, well, there is no evidence of it.

That position was pervasive in our culture, and was well known to everyone including Jesse Williams, that's exactly what he became persuaded of. So to say that we can't identify a specific misrepresentation is simply to say that there were so many of them, of course, that no one could, other than a student of this particular kind of litigation.

We have provided those kinds of

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[Tr. 91] this ruling in connection with this particular instruction, Your Honor, but there was argument to the effect that since they had to prove their injuries arose out of smoking cigarettes after September 1988, we had to prove, that is, defendant had to prove that they were negligent in connection with cigarettes purchased after September of 1988.

Your ruling was no — what's sauce for the goose is sauce for the gander.

THE COURT: I am relying on the statutory language, 30.905, which requires that, "A product liability civil action," of which this is one is, "shall be commenced not later than eight years after the date on which the product was first purchased for use."

So at seven years and 364 days, a product sold and purchased which caused harm to the plaintiff or which was a substantial factor in the cause of harm to the plaintiff could be timely, so long as all the other elements of the claim are met.

And it's my belief, as we talked about before in connection with what Mr. Randles

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[Vol. 22-C] [Oral Argument — Punitive Damages (Mar. 23, 1999)]

* * *

[Tr. 68] consider the harm caused elsewhere?

Mr. COON: The Oregon statute says you can consider the likelihood that serious harm would arise, profitability, degree of the awareness, duration of misconduct.

It is just not the duration of the misconduct that caused harm to Jesse Williams. It is the duration of the misconduct that caused harm to other people. We should be clear, there is harm to other folks, and then there is harm to other folks outside Oregon.

I don't think maybe the defendants are arguing harm to other people in Oregon, I think they are arguing about what might have happened to people outside of Oregon.

THE COURT: What part of your 34, Mr. Beattie, is directed to this Gore v. BMW?

MR. BEATTIE: Much of it, Your Honor.

THE COURT: Tell me where to look.

MR. BEATTIE: This one aspect is addressed on Page 3 at Lines 1 through 6, carrying over from Page 2. But most importantly at 5 and 6 where I have alternative highlighted, "You are not to punish the defendant for the impact of its conduct on individuals in other [Tr. 69] states" and that works into reviewing plaintiff's requested jury instructions states the statutory standards.

On No. 1, "The Likelihood" — and I'm reading from the bottom of Instruction No. 34 on the first page. "The likelihood at the time that serious harm would arise from Defendant's misconduct." For it to meet the constitutional requirements, it should say, "The likelihood at the time the

serious harm would arise in this state for defendant's misconduct."

On 3, "The profitability of defendant's misconduct in this state." Both of those, 1 and 3, have to be state-specific under BMW v. Gore. Otherwise, you would be punishing them for harms to other people outside of Oregon that may not be punishable in those states.

THE COURT: Okay. So you are suggesting that Elements 1 and 3 need the modifier "in this state." What else needs to be done to the statutory elements under your version of the constitutional requirements?

MR. BEATTIE: I think that the elements also have to have something in them that instructs the jury that there should be a [Tr. 70] reasonable relationship between the harm caused to Jesse Williams, the amount awarded plaintiff, and the amount of punitive damages. This is at the bottom of Page 2.

THE COURT: What's the origin of that argument in terms of authority?

MR. BEATTIE: This is another Gore v. BMW. And I have to confess this is generally addressed post-judgment — post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive.

But the cases also state that the same factors that the Court considers in determining whether punitive damages award is constitutionally excessive are or can be the same factors considered by the jury in calculating the award in the first place.

THE COURT: Maybe I'm being too pragmatic here, but don't we have punitive damage instructions that have survived scrutiny post-whatever --

MR. COON: Post-Oberg, we have.

THE COURT: — in Oregon, that would give me some assurance that I'm not just following a statute blindly, but meeting the constitutional [Tr. 71] issues that have been addressed and resolved by our appellate courts?

MR. COON: We don't have — Gore is a '96 case and —

THE COURT: Gore is from Alabama, U.S. Supreme Court, constitutionality issues. I was hoping we could start first by addressing our Oregon Constitution. What we have got here is that our appellate courts have already said is okay before we —

MR. COON: This is an issue, as the Court probably knows, through Oberg, it is something that Oregon courts have done with their own statute, which was then amended in 1995. And it turns out not to be an Oregon constitutional thing, because there is no due process clause in the Oregon Constitution.

THE COURT: And you had to come here, Mr. Randles.

MR. COON: Without due process. It gets right to the Supreme Court.

THE COURT: Never mind.

MR. COON: One thing that Jay says is important. Many things are important, but one I noticed was that this — these factors, these [Tr. 72] four factors are ones that the Court in Gore apparently, and according to Parrott v. Carr Chevrolet, the Court of Appeals applied post-judgment, or maybe the trial Court applies post-verdict.

So this question of proportionality — one of the other factors is what are the other penalties out there and how does this stack up for any criminal penalties for this conduct that might exist, a factor that I'm not sure that anyone can coherently argue is good grist for jury instruction. That's one of the three Gore factors. One is proportionality, how big is this

compared to damages, and one is reprehensibility to the conduct.

THE COURT: Let me stop first and go back to the proportionality point you're making. Is there case law that says that the trial Court shall, in order to have a constitutional instruction, tell the jury about proportionality?

MR. BEATTIE: It has always been addressed post-verdict.

THE COURT: That's where I'm going to address it then. Unless you can show me that [Tr. 73] there is authority that I have to do it for the jury, why wander where no judge has been told to go before?

MR. BEATTIE: I think it is an accurate statement of the law and in the instruction. I certainly understand your view.

THE COURT: I am just trying to be safe. If there is no case law that says I need to do it to be constitutional, and if there is a punitive award, it is a standard I have to evaluate with guidance and briefing from both sides, obviously, I will do that. Unless it is required for the jury, they have got plenty to consider.

So that would be your Element 1 on page 2, Mr. Beattie; is that right?

MR. BEATTIE: That has to do with proportionality. It also has a second prong. It says, "You may consider the extent of harm suffered by others in determining what the reasonable relationship is. You are not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims and award [Tr. 74] punitive damages for those harms."

This is sort of a State ex rel Crookham sort of rush-to-the-courthouse issue where the defendant is simply trying to make sure, on one hand, that the first person in line doesn't

get all of the damages to the exclusion of everybody else. But then, on the other hand, wants to make sure that the defendant is not being punished in this case for alleged harms that other persons can recover for in their own right.

So to the extent in this case they are claiming we should be punished because other persons have been harmed, and you should take into consideration those particular harms, that's not for the jury to consider because those persons themselves can recover.

THE COURT: But the goal of punitive damages is punishment and deterrence in the future; punishment for past misconduct of the defendant and deterring conduct that will hurt those other potential litigants in the future, too, so it is not necessarily resolvable that way.

MR. COON: I guess the way I would [Tr. 75] respond to that, the seven factors in the statute the Legislature had said, "These are the factors, and No. 7 is how much you have paid other people."

So what the Legislature has said is we should look back and see, had this defendant been tagged by other juries for other punitive damage amounts? But it does not say other amounts that might be awarded in the future. And the Legislature —

THE COURT: Well, I know that statute doesn't say that. What I am trying to give due consideration to is whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration in terms of what they are considering.

It seems to me that, first of all, our Legislature has considered total deterring effect and other punishments. And where there is evidence about that, obviously the jury needs to be instructed on.

In this case, unlike — for example, like the Purcell case, we did have a defendant which had been the subject of other punitive damage awards and chose to litigate that, brought in [Tr. 76] evidence that we had been punished enough and argued to the jury we have been punished enough, and the result was what the result was, and maybe that helped. We don't know, in the end, whether that made the jury go up or down.

But in terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first — we have already told the jury that punitive damages are not compensatory damages.

I would maybe say — instead of saying "intended to compensate plaintiff," I might say "compensatory damages." They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff. They are designed to punish and deter.

So I guess what I'm saying, this seems repetitive to me in that regard, the second half of your Item 1 at the bottom of page 2.

MR. BEATTIE: Well, it really isn't. [Tr. 77] What we're saying in that paragraph, you shouldn't punish us for harms to other persons who can bring their own claims for punitive damages and not compensatory damages per se.

So in calculating the amount of punitive damages under the statute — and let me be candid at this point here. I understand that you are bound by the statute at this point. I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there.

THE COURT: Is there case law that says this element has to be there for the jury?

MR. BEATTIE: Not directly, no. It is another one of the considerations that the Court looked at in the BMW case and a number of others.

THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one — if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," [Tr. 78] if that gets you where you need to be. They are designed to punish and deter.

MR. BEATTIE: Okay.

THE COURT: Do you want to introduce the phrase "or anyone else," — "compensate plaintiff or anyone else," or are you satisfied with "plaintiff" alone there?

MR. BEATTIE: I would go with the phrase "or anyone else."

THE COURT: Is there error with that?

MR. COON: No error.

THE COURT: So I think I have satisfactorily worked my way through your Element No.1. What other parts of your instruction —

MR. BEATTIE: I'm sorry to keep going backwards.

THE COURT: Hold on. Mr. Randles wants to jump in.

MR. RANDLES: Did we resolve the other states question?

THE COURT: No, we haven't. I have written it in parenthesis yet. I am trying to work myself through all the other pieces and see what is missing and what I am obliged to give

* * *

[Vol. 23-B] [Plaintiff's Closing Argument (Mar. 24, 1999)]

* * *

[Tr. 91] lives of other people who need whole truths.

When you determine the amount of money to award in punitive damages against Philip Morris, think about the evidence, think about the years. It's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future.

You're not going to, under the limitations of the case before you, which one of the rules is you can't award more money than is sought; you can't kill Philip Morris, and we wouldn't ask you to. You can't do serious harm to Philip Morris. You can't make them bleed.

But you might get their attention, and you might make them trot off down the right trail after this trial is over. That's our hope; that's the measure of justice we ask you for, and I wish you the best in your endeavor. It will be hard work.

Thank you.

THE COURT: Thank you, Mr. Gaylord.

Jurors, I remind you that you must avoid any press coverage of this case until you

* * *

[Vol. 24-C] [Plaintiff's Rebuttal Argument (Mar. 25, 1999)]

* * *

[Tr. 96] manufacturer that has a product that kills 400,000 people a year.

MR. DUMAS: Objection, Your Honor.

MR. THOMAS: I'm talking about reasonableness, Judge.

THE COURT: Objection sustained.

MR. DUMAS: Thank you.

MR. THOMAS: What I want to do is to show you what is the undisputed proof about the net worth of Philip Morris, which is the part of the jury instruction that you are to consider under the term "financial condition."

Remember Dr. Bassett, the economist. Philip Morris chased him all over. That was one of the most aggressive cross-examinations of an economist that I have ever seen that Mr. Dumas conducted.

I have to say that you scorched that guy, Mr. Dumas, but the fact of the matter is, he held up. He had good proof. And the figure is $17 billion is the net worth of this company.

In terms of what $100 million, which is the ceiling above, which you cannot go in this case, bears as a ratio to the net worth of Philip Morris is a dime to a figure of $17. Or [Tr. 97] one-tenth of a dollar to $17.

That is the ratio of the punitive damages claim in this case. You have to decide what is it that has to be done to demonstrate to this company and others who are watching that this — that this — that this — this is not okay.

What's it going to take? I suggest to you that the mule analogy that Bill Gaylord gave you yesterday was a pretty good one.

In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third of the market.

Market share of Philip Morris is almost 50 percent of that. But three of the hundred are going to die from smoking Marlboros. The other seven are going to die from something else. Another Philip Morris brand? Brown and Williamson? R.J.R.? They aren't here.

But in terms of the calculations of what this product does for people, you know, you hear [Tr. 98] the term associated with jury service, conscience of the community. A jury has got a grave responsibility.

In criminal cases, a sentence of imprisonment. In a civil case, the most you can do is a sentence of money. And in this case money is what Philip Morris is going to understand, and it's the message that they are going to hear most.

The last thing I said to you when we started this case was, the justice in this case that you render, if you do your job right, if you work hard, is going to be the best product Mrs. Williams; Mr. Gaylord; me; my partner, Jim Coon; Chuck Tauman; Freida; Joanne; Glenn, will take. It's your decision.

THE COURT: Jurors, we'll be in recess until 9 o'clock tomorrow at which time I will instruct you regarding the law that applies to the case and then you'll be retiring to deliberate.

Get a good night's sleep. Don't discuss the case. Leave your notes on the chair. See you tomorrow at nine o'clock.

* * *

PLAINTIFF'S EXCERPTS OF RELEVANT TRIAL EXHIBITS IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

[Plaintiff's Exhibit 5]

A Frank Statement to Cigarette Smokers

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. However, we do no believe that any serious medical research, even though its results are inconclusive should be disregarded or lightly dismissed.

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.

2. That there is no agreement among the authorities regarding what the cause is.

3. That there is no proof that cigarette smoking is one of the causes.

4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business.

We believe the products we make are not injurious to health.

We always have and always will cooperate closely with those whose task it is to safeguard the public health.

For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence.

Regardless of the record of the past, the fact that cigarette smoking today should even be suspected as a cause of a serious disease is a matter of deep concern to us.

Many people have asked us what we are doing to meet the public's concern aroused by the recent reports. Here is the answer:

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. This joint financial aid will of course be in addition to what is already being contributed by individual companies.

2. For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.

3. In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. A group of distinguished men from medicine, science, and education will be invited to serve on this Board. These scientists will advise the Committee on its research activities.

This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

TOBACCO INDUSTRY RESEARCH COMMITTEE

5400 EMPIRE STATE BUILDING, NEW YORK, N.Y.

SPONSORS:

THE AMERICAN TOBACCO COMPANY, INC. Paul M. Hahn, President	BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION John W. Jones, President	PHILIP MORRIS & CO., LTD., INC. O. Parker McComas, President
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BURLEY AUCTION WAREHOUSE ASSOCIATION Albert Clay, President		UNITED STATES TOBACCO COMPANY J. W. Peterson, President

[Plaintiff's Exhibit 10]

Shuns Meet

said. "The governor's office is not the place."

Many residents in the area surrounding the Anoka airport are opposed to expanding the airport for Air National Guard jet planes.

"Where the additional facilities for the defense installations are to be located in the metropolitan area is not my decision to make," the governor wrote.

Hannaff

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LIFE ON MARS SU

By BOB BANDON

Compiled and Edited from Pioneer Press News Services

Do little men really live on Mars?

Scientists will try to find out June 30 when the planet con within a paltry 60 million miles of the Earth. Best scientific gu now. Plant life, maybe. Little men, no, no matter what the fan writers say.

Science

That's the report of the International Mars m nature, meeting in Washington to plan for the gr event. Other things they hope to determine weather. The precise diameter of Mars. More ex mea...ements all around.

THE CIGARET industry would "stop business tomorrow" if it thought its product was harming smokers, according to George Weissman, vice president of Philip Morris and Co., in a speech in Chicago Tuesday. He blames the cancer problem on "medical propaganda . . . by a small number of doctors and a large number of magazines and newspapers."

• • •

THE U. S. government this week will try out a plan to sell stamp collectors the canceled stamps it gets on incoming worldwide mail in hopes of adding a few extra dollars to the Treasury. . . .

U.S.

ABOUT 186 television stations in 53 cities will be able to present color programs by early 1955, it was estimated in Washington Tuesday by NBC officials.

ONCE a notorious bootlegger, Abner (Longie) Zwillman says he'll help finance a "million-dollar project" to wipe out the Newark, N. J., slums in which he was born. The 50-year-old

LIBERACE, controversial

TRIAL EXHIBIT 18,499

m of vand prankst

tore out the mail-box. His mother reported the incident to police.

PEGGY ANN GARNER, blond star of "The Moon is Blu now on the road, pleaded gu for failure to answer three traffic tickets in New York and was fined $53. "I was never so scared in my

Beverly

life," she s . . . BEVERL PACK, 20-ye old "Maid Cotton" of 19 left New Yo by plane London on a two-week Europe tour . . . BARBARA GRAY A

BEST AVAILABLE COPY

[Plaintiff's Exhibit 11]

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

JOANN WILLIAMS-BRANCH
Personal Representative for
the Estate of JESSE D. WILLIAMS, Deceased

Plaintiff,

v.

PHILIP MORRIS INCORPORATED and
FRED MEYER, INC.,

Defendants.

NO. 9705 03957

PHILIP MORRIS INCORPORATED'S RESPONSES TO PLAINTIFF'S SECOND REQUEST FOR ADMISSIONS

Defendant Philip Morris Incorporated ("Philip Morris"), by its attorneys, hereby responds to Plaintiff's Second Request for Admissions ("Requests") as follows:

GENERAL OBJECTIONS

a. Philip Morris objects to these Requests to the extent they attempt to impose obligations on Philip Morris other than those imposed or authorized by the Oregon Rules of Civil Procedure and/or any other applicable order of this Court.

b. Philip Morris objects to certain of these Requests on the ground that they ask Philip Morris to admit that certain quoted or referenced language appears in [P. 2] documents, which are never quoted in their entirety, without providing sufficient information to allow Philip Morris to identify the

particular document about which Plaintiff is requesting an admission. Philip Morris has attempted, in response to these Requests, to identify documents in its possession that contain the quoted or referenced language. However, in making these responses, Philip Morris does not admit or deny the authenticity or admissibility of these documents. Phillip Morris also does not represent that its responses to these Requests would be the same if it had a copy of the document that Plaintiff had in mind when Plaintiff framed the Requests because, among other things, there may be more than one document that contains the language quoted or cited in these Requests. Philip Morris reserves the right to assert applicable evidentiary, privilege and other protection objections to these documents and does not waive its claim of privilege or other protection objections to these documents in the future. Philip Morris has not waived, and does not waive, its claim of privilege or other protection and evidentiary objections with regard to any such document. Furthermore, Philip Morris does not waive, and cannot waive, the claims of privilege or other protection and evidentiary objections of others.

c. Philip Morris objects to these Requests as vague [P. 3] and ambiguous as to the meaning of the term "authentic" used by Plaintiff, because Rule 901 of the Oregon Rules of Evidence refers to what the proponent claims the document to be, and these Requests do not state what Plaintiff claims each document to be. Moreover, Philip Morris objects to these Requests on the grounds that they are overly broad and unduly burdensome, and seek information that is neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence. Further, Philip Morris objects to the Requests because they impose an undue burden on Philip Morris by requiring it to admit or deny authenticity of documents that Plaintiff has not yet selected for use at trial or in a manner that would implicate their authenticity.

d. Philip Morris reserves the right to assert additional objections to these Requests as appropriate and to supplement these objections.

These General Objections are incorporated into each of the following responses to Requests, and the General Objections shall be deemed continuing as to each Request and are not waived, nor in any way limited, by the following responses.

RESPONSES TO REQUESTS

REQUEST FOR ADMISSION NO. 27: In or about 1954, Parker McComas, then chief executive officer of Philip Morris, acting as chairman of the Tobacco Industry Research Committee, stated that [P. 4] "If the industry leaders really believed that cigarettes caused cancer, they would stop making them."

RESPONSE: Philip Morris objects to the phrase "acting as chairman" on the grounds that it is vague and ambiguous. Subject to and without waiving its specific and General Objections, Philip Morris admits that the following language is attributed to O. Parker McComas, then Philip Morris President and chairman of the TIRC, in a 1954 magazine article: "If the industry leaders really believed that cigarettes cause cancer, they would stop making them." Philip Morris denies that this language is quoted in context.

REQUEST FOR ADMISSION NO. 28: In 1962, Philip Morris president Joseph Cullman told the Philip Morris annual stockholders meeting that, if there were a connection between cigarette smoking and human disease, defendant would not be in the business of making and selling cigarettes.

RESPONSE: Subject to and without waiving its General Objections, Philip Morris states, after conducting a reasonable inquiry, it denies that the language referred to in this Request appears in then Philip Morris President Joseph F.

Cullman's 1962 address at the Philip Morris annual stockholders meeting.

REQUEST FOR ADMISSION NO. 29: In or about 1963, Philip Morris executive assistant James Bowling told Thomas Whiteside, a reporter for the *New Yorker*, that the tobacco companies "believe there is no connection" between smoking and disease, "or we wouldn't be in the business."

[P.5] RESPONSE: Subject to and without waiving its General Objections, Philip Morris admits that the quoted language is attributed to James Bowling, then Director of Public Relations, in an article appearing in The New Yorker in or about 1963, but denies that this article is quoted in its entirety.

REQUEST FOR ADMISSION NO. 30: Exhibit A, attached hereto, is a true and authentic copy of Exhibit 10,322 offered and admitted in *State of Minnesota v. Philip Morris, Inc., et al*, number C1-94-8565, a report entitled "Smoking and Health Significance of the Report of the Surgeon General's Committee to Philip Morris Incorporated," dated February 18, 1964 and authored by Helmut Wakeham.

RESPONSE: Subject to and without waiving its General Objections, Philip Morris admits that Exhibit A is a true and authentic copy of document number 1000335612/5625, a document authored by Helmut Wakeham, found in the files of Philip Morris, with the exception of the stamps marked "Trial Exhibit 10,322" and "Exhibit A-1" through "Exhibit A-14," which do not appear on the document as it exists in the files of Philip Morris. Philip Morris further admits that Exhibit A is a true and authentic copy of Exhibit 10,322 offered and admitted in *State of Minnesota, et al. v. Philip Morris, Inc., et al.*, with the exception of the stamps marked "Exhibit A-1" through "Exhibit A-14," which do not [P. 6] appear on the document as admitted in the State of Minnesota case.

DATED this 30th day of November, 1998.

LINDSAY, HART, NEIL & WEIGLER, LLP

By:
James L. Dumas, OSB No. 77167
John D. Kimmerlien, OSB No. 95537
Attorneys for Defendants

TRIAL ATTORNEY: James L. Dumas [P. 7]

[Plaintiff's Exhibit 32]

Dr. M. W. DuPuis July 24, 1958

C. V. Mace

Brief comments on a program to produce a low delivery filter cigarette with flavor.

Inasmuch as the evidence (See bulletin of Cancer Progress March–April 1958, Vol. 8, No. 2) is building up that heavy cigarette smoking contributes to lung cancer either alone or in association with physical and physiological factors such as air pollution, pre-disposition, nervous tension, rate of living, etc., I believe we should increase the departmental effort, both in terms of short range and long range objectives, towards the development of a low delivery cigarette having good flavor. Now what should the short range and long range objectives be, and how should we go about it?

For short range, let's concentrate on means to produce a substantial reduction in tar delivery, even if it is only across the board, since the chance is good that any specific irritant and/or carcinogen, if present, would be reduced also. For long range, let's study means for identifying carcinogenic substances as well as all substances in cigarette smoke that are irritating or are known to produce undesirable physiological effects, and find means of removing them. If the latter appears to be impossible, let's develop a non-tobacco cigarette which doesn't have them to begin with. Now, how should we go about it?

For short range, let's increase the effort on the development of a better filter, giving slightly less priority to ventilation, tobacco catalysts and tobacco extraction. At the same time, let's increase the effort on the flavor program since this must proceed simultaneously with the filter program. Further, since there is evidence that rubber-like odors (isoprens)

in the gas phase become more pronounced as the smoke solids are reduced, a charcoal absorbing filter (part of a multiple component filter) may be necessary, unless the odor can be masked by the addition of certain flavors.

The short range program could be carried out most efficiently, I think, by setting up a group in the Research Division to determine the best chemical and physical principles or combinations of the two to produce an efficient smoke filter. This would be a fundamental group, and would be concerned primarily with surface-chemistry and with developing the best chemical and/or physical principles required to filter cigarette smoke completely with a small resistance to air flow. Information obtained here would be passed along to the filter group in the Development Division which would be responsible for developing and constructing prototype filter models and evaluating them, based on the fundamental studies.

[P. 2] The long range program would grow out of the studies being carried out by the fundamental filter group as well as the other groups of the Research Division working on smoke chemistry. The fundamental program could be broadened to include the study of tobacco additives (catalyst), tobacco extraction and finally an all synthetic aerosol to replace tobacco smoke, if necessary. Simultaneously, other sections of the Research Division should be making a strong effort to develop means to evaluate the physiological effects of smoking. Initial studies could be carried out with animals or certain animal tissues known to be irritated by cigarette smoke, and known to be susceptible to cancer when exposed to known carcinogens. The effect of known carcinogens, both alone and in the presence of cigarette smoke, could be studied on the animals or tissues to determine whether cigarette smoke behaves like a co-carcinogen. Further experiments could be conducted with cigarette smoke to see if it has direct carcinogenic activity. Simultaneously with these,

the irritating effects of cigarette smoke should be studied, both on animals and humans.

In addition to these, exploratory studies could be made on humans to determine why people smoke. Dr. Baer of the Food & Drug Research Lab has some pretty good ideas as to how to go about this, and he is writing them to us. More about this at another time.

I know this sounds like a wild program, but I'll bet that the first company to produce a cigarette claiming: a substantial reduction (say 50% less than the present Parliament and Kent) in tars and nicotine, or an ersatz cigarette whose smoke contains no tobacco tars, and with good smoking flavor, will take the market. Further, if he has the intestinal fortitude to jump on the other side of the fence (provided he has some convincing experimental evidence to back him up) on the issue of tobacco smoking and health, just look what a wealth of ammunition would be at his disposal. Of course, we would have to be careful to infer that the reason for the change in dress was the continuing evidence linking cigarette smoking with health, and that although the evidence is not altogether irrefutable we have decided upon this course of action in the public interest. In this way, we have protected our bridges behind us because we have not admitted there is a direct relation between smoking and health, and we are building new bridges ahead which we will need if there is a flood, but which we will not need if there is no flood. In other words, we are planning for the worst; and in the event it proves unnecessary in the future, the experience gained should be useful for other purposes.

[Plaintiff's Exhibit 39]

PHILIP MORRIS INCORPORATED

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: • Dr. R. B. Seligman Date: June 3, 1960

From: • L. L. Long

Subject: • May 24th Project Review — 1960 Cigarette

During the discussions on the 1960 Cigarette, the following ideas were presented:

1. A method for increasing the nicotine content of cigarettes was discussed. The results to date show an increase in the smoke delivery of total alkaloids proportional to the amount of nicotine maleate added. It was suggested that we may improve the smokability of BL by increasing its nicotine content in this manner. It was further suggested that we check the smoke alkaloids from cigarettes treated with the nicotine maleate to determine which alkaloids are being measured.

In evaluating a cigarette with a 14 mg TPM delivery and a 1 mg of nicotine delivery, it was suggested that we have the smoker smoke a full cigarette for build up effects and further to conduct pack hand out tests. Aftertaste was mentioned as something to be observed in such tests also.

2. During the discussions on paraffin wax treated fillers, it was suggested that we extinguish partially smoked cigarettes, then disect them for microscopic analysis. This type of examination may reveal the nature of the mechanism which causes the large increase in RTD during smoking.

3. The final point of interest was one concerning the project objective. It was suggested that the project objective

may not be broad enough and that perhaps it should be changed to cover several different categories of cigarettes. However, it was generally conceded that any or all of the different categories of cigarettes. (such as mentholate cigarettes with carbon plugs, controlled nicotine level at various TPM's, etc.) would fall out of the current project.

/aj

cc: Dr. L. S. Harrow

Mr. J. W. Geiger

Mr. G. E. Shaffer, Jr.

Mr. J. D. Hind

Mr. J. Y. Mason, Jr.

Mr. J. O. Millham

[Plaintiff's Exhibit 44]

PHILIP MORRIS INCORPORATED
INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: • Dr. R. H. Blackmore Date: March 19, 1962

From: • R. M. Wiley

Subject: • High Nicotine to T.P.M. Ratio of All R. J. Reynolds Brands

In compliance with Mr. Hugh Cullman's letter to Dr. Wakeham requesting that we investigate possible means used by R. J. Reynolds to achieve the high nicotine to T.P.M. ratio present in all of their brands, the following possibilities are set forth:

1. Blend
2. Humectants
3. Extraction or additives
4. Paper

1. It would be possible to control the necessary variables through blending. This approach was investigated to a considerable extent, but the large number of variables (year-to-year, belt-to-belt and grades within belts) precluded any valid formulation of blend. (See Table I in the Appendix) However, the alkaloid content in all of Reynolds brands is at the high end of the scale. This does not say that this is entirely responsible for the high nicotine to T.P.M. ratio and it does not preclude their adding nicotine to the blend. Also, there is not enough known, technologically, to be able to tell if the nicotine has been added or if it was present in the natural state.

2. The humectant, propylene glycol, has a direct bearing on the nicotine to T.P.M. ratio as can be seen on the graph

designated as Table II in the Appendix. As the humectant level is reduced, the nicotine to T.P.M. ratio increases. Possibly the ratio is achieved through the combination of blend and humectant. At present we have no reason to believe that this does not hold true for other humectants such as glycerine, but we do not have any experimental data at this time.

3. Another possible approach could be through extraction of the filler and/or addition of nicotine to the filler to obtain the desired level. Preliminary work in the area of extraction with various solvents has shown that in general the nicotine and T.P.M. delivered is reduced. Selective solvent extraction would effect a greater percentage reduction in T.P.M. than nicotine delivery. Additionally, if nicotine were added to the extracted filler, probably in the form of nicotine molate, the T.P.M. level would not increase as much percentage wise as the nicotine level. Hence, the ratio of nicotine to T.P.M. would be raised. [P. 2]

4. The effect of paper on this ratio is less marked but may have a bearing on the matter. R. J. Reynolds made a cigarette paper change to a more porous paper in all of their brands at the time the high ratio was first observed. A partial additive effect may have been gained. That is, where the paper change alone was not sufficient to affect the nicotine to T.P.M. ratio observed, it would add to the overall effect of other changes that were made — possibly humectant and blend.

An analysis of available data on additives (such as Aluminum Oxide) gave no indication that the ratio of nicotine to T.P.M. was elevated by the introduction of additives. This does not preclude the use of additives by R. J. Reynolds, but our state of the art has not progressed to the point where we can achieve an effect on the nicotine to T.P.M. ratio through the use of additives.

The following are investigations that could be pursued to enhance our knowledge of the means of effecting a high nicotine to T.P.M. ratio.

1. Analyze many humectants to determine their effect on the nicotine to T.P.M. ratio.

2. Study the effect of various additives on the nicotine to T.P.M. ratio.

ra /s/

cc: Dr. A. Bavley (3)

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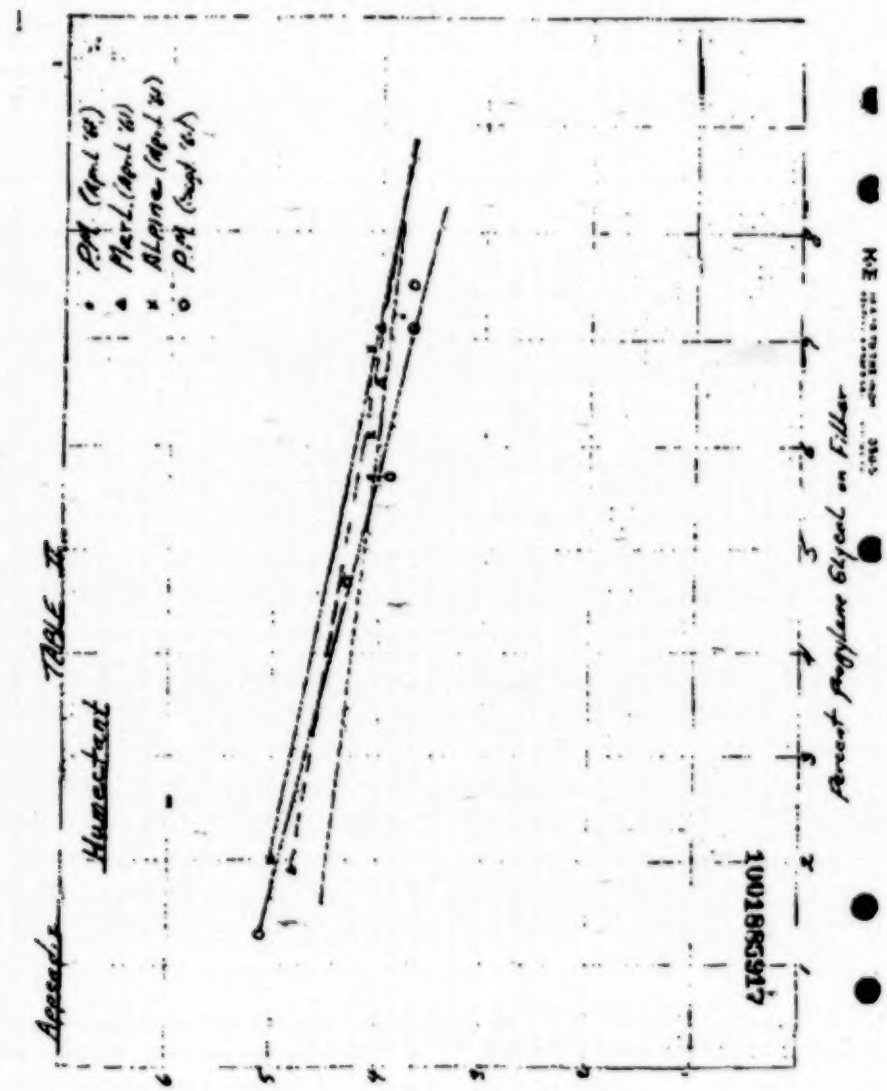

TABLE I

APPENDIX															
	Nicotine Content of Burley and Bright Tobacco Leaf (Percent)														
Type	1956			1957			1958			1959			1960		
Burley	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.
Belt	2.85	3.43	2.17	3.49	4.05	2.71	2.10	3.18	1.30	2.95	3.92	2.29	3.12	3.98	2.32
Total Sales – Lbs.	482 mil. lbs.			4.78 mil. lbs.			483 mil. lbs.			499 mil. lbs.			508 mil. lbs.		
Bright Belts	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.	Avg.	Max.	Min.
Georgia	1.71	1.87	1.42	1.87	2.13	1.64	1.58	1.79	1.46	1.41	1.53	1.30	2.04	2.52	1.86
Border	2.11	2.48	1.87	2.51	2.97	2.02	1.67	2.37	1.26	2.17	2.60	1.75	2.38	2.85	2.03
Eastern	1.77	2.13	1.60	3.34	3.75	2.65	2.16	2.53	1.54	2.39	2.64	2.00	2.00	2.59	1.46
Middle	1.79	2.15	1.61	2.97	3.95	1.97	2.25	3.20	1.45	2.30	2.60	2.07	2.49	2.75	2.21
Old	2.17	2.51	1.72	3.10	3.62	2.58	2.51	3.21	1.86	2.51	2.67	2.18	2.64	2.86	2.26
Crop Avg.	1.91	2.23	1.64	2.76	3.28	2.17	2.03	2.62	1.51	2.16	2.41	1.86	2.31	2.71	1.96
	Total Sales – Mil. Lbs.														
Georgia		183			120			134			161			183	
Border		333			254			263			279			311	
Eastern		508			353			402			359			444	
Middle		179			124			137			136			170	
Old		333			235			250			250			262	
Total		1,536			1,086			1,186			1,185			1,360	

TABLE I

[Plaintiff's Exhibit 50]

Mr. Joseph F. Cullman 3rd January 29, 1964

George Weissman

Surgeon General's Report

Inasmuch as I am leaving soon and am involved in preparations for my trip, I thought I would pass on to you some of my thoughts regarding the recent release of the Surgeon General's Report.

I. REACTION

While the propaganda blast was tremendous and the penetration of public opinion very widespread, I have the feeling that the public reaction was not as severe nor did it have the emotional depth I might have feared. Certainly, so far it is not of a nature that caused the prohibitionists to go out with axes and smash saloons nor even of the more recent shock and reaction to the thalidomide scandal.

The individual comments as well as the press reflections are comparatively mild, ranging from a certain light touch, defiance, to the more serious proposals.

Yet even the most serious opponents of the industry have not come up with "life or death" for the industry kind of proposals.

Obviously this reaction is still to be studied and observed, but it leads me to the belief that we can perhaps proceed slower than I might have anticipated a month ago in having the tobacco industry take the initiative in certain areas.

II. PUBLIC RELATIONS PROGRAM

A. The restraint and unity of the industry has been very effective in this period. The opponents have had their inning.

The industry has demonstrated its seriousness and responsibility is saying we would study the Report.

B. However at some point, reflecting the same seriousness with which we met the Report, we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking. Those answers must also point up the weaknesses in the Report and the path for future research.

However it cannot be done under the flag of saying the unanimous opinion of the Surgeon General's Committee is wrong. Therefore I propose that when the white paper analyzing the Report is completed [P. 2] a press conference be called (if possible on an equal time basis with the Surgeon General in the State Department auditorium) in which perhaps Clarence Cook Little and the various industry research directors and scientists and Dr. Hockett and Dr. Franzen, etc., would get up and take the following approach:

"We have studied the Surgeon General's Report which is an excellent comprehensive analysis of previous statistical studies. When it was released the Surgeon General noted that more research was necessary, and after analysis of the Report we find these are some of the areas for which the research is necessary:

1. Page 154 of the Surgeon General's Report recognizes significant beneficial results of smoking primarily in the area of mental health, but goes on to say there are no means of quantitating those benefits and that the Committee had no means of weighing the benefits versus the hazards. In those times when _____ percentage of our population may be effected by matters of mental health, we think the imperative factor is that further research be done in those areas.

2. On page ___ the death rates for smokers are equal to or lower than the general white male death rate in the United States. Obviously this is an area of research.

3. Filters, etc.

4. The technical analysts will obviously have hundreds more items like this indicating research possibilities, contradictions, discrepancies, etc. The main thing I want to emphasize is the approach should be that this fine Surgeon General's Report opens up all those paths to further research.

C. Humor and satire. While it should not be done in the industry's name, someone ought to be contacting all the cartoonists, television gag writers, satirical reviews, etc., to apply the light touch to this question.

D. The most potent political force in America are the media and they will be most directly concerned with this battle. To the extent possible, they should carry a good deal of the ball.

III. LABELING ACTION

In view of the reactions so far to the Surgeon General's Report, I am reversing my previous position that it might be wise for the industry to take the initiative in securing a wild federal labeling act to thwart the efforts of the various states. Perhaps we will have to ultimately make the concession, but in England they have been able to hold it off. [P. 3] Advertising guides, vending and media restrictions are all subject to change in future years, but a labeling act is very permanent.

If we are forced into one, every effort should be made to counterpose the health caution with the statement that the Surgeon General also recognizes significant beneficial effects of smoking primarily in the area of mental health.

If possible, the state legislatures could be held off on the basis that this is a federal matter and the federal can be the subject of many hearings.

In closing, the main essence of the Report and the publicity to me is that it has still left smoking on an individual basis, the individual's own choice of the psychological benefit

versus the alleged hazard. Anything that impinges on the right of the individual to make this choice is contrary to our most basic traditions.

/s/

George Weissman

GW:pec

cc: Mr. P. D. Smith

Mr. J. C. Kowling

[Plaintiff's Exhibit 53]

March 25, 1964

1965 CIGARETTE

PROGRAM OBJECTIVES AND APPROACH

1. Product shall allow satisfactory function of pulmonary clearance mechanisms
   a. Insignificant effect on mucous flow
   b. Removal (90% level) of
      HCN
      HCHO
      Acrolein
      Phenol
   c. Obtain physiological data on Formic acid and croton-aldehyde and finalize analytical procedure for Formic acid.
   d. Acute tests should be run on 2 or more animals, procedures should parallel FDA type tests.
   e. Concentration points should bracket area of actual interest.
   f. Investigate setting up phagocytosis tests for checking and screening candidate sample.
2. TPM Delivery

   TPM delivery level should be $\geq$ 10 mg.
3. Nicotine Delivery

   Nicotine delivery level should be 0.7 mg. minimum.
   a. Investigate purchasing nicotine.

b. Add nicotine to cigarette and define contribution of nicotine to flavor.

c. Can we transfer nicotine from filter to smoke?

4. The product design should include consideration of chemical carcinogens within the following framework

a. The polynuclear analytical method should immediately be made available for selected samples.

b. Investigations should be made of the relationship between high nitrate blends and polynuclear concentrations.

1) Low and High nitrate blends. [P.2]

c. Determine effect of porous vs. regular cigarette paper on polynuclear concentration (polynuclears/mg TPM).

d. Check polynuclear data on cigarettes containing naturally low TPM blends.

5. Adsorbents

a. A selection of specific silicas, carbons, and aluminas will be made and the materials checked for their capabilities to remove the designated undesirable gases components.

b. Chemical means will be investigated for removal of the candidate gases, particularly HCN.

c. Outside research laboratories will be contacted for recommendations in relation to specific adsorbents.

d. Monitor CO in tests.

6. Series T

a. Recommended a dual program encompassing the paper filter alternate be conducted until field tests on Series T are completed.

b. Problems to be resolved with du Pont after field tests

1) How firm a commitment is needed for commercial supply?

2) Notice needed for Test Market Supply.

3) What is best estimate of availability data of commercial supply?

c. Work should begin immediately on design and construction of new Series T cutters.

7. Cigarette Filter Construction

a. Product definition of two candidate triples (less flavor transfer) should proceed immediately with hand samples.

b. Triple sections can vary from 6 2/3 to 10 mm in length, preferably 6 2/3 mm. Total of all three should not exceed 25mm.

c. Triple machines should be delivered early in April. [P.3]

d. It is recommended that the carbon paper filter be omitted if possible from the Series T triple to minimize possible paper taste problems.

e. An overall RTD level of 5.3–5.5 inches of H_2O is considered acceptable, 5.7–5.8 is not considered acceptable.

8. Flavor

a. Adequate flavor is defined as that which gives no preference in tests against brands in the 5 to 10 billion range such as:

Parliament	Old Gold
Tareyton	Raleigh
Lark	

b. Flavor should be put on both filler and filter.

c. Program with flavor houses should be encouraged.

d. Method of incorporating flavor and gas phase activity needs to be defined.

e. Tests on flavor should be run with low TPM filter similar to proposed filter.

9. Tobacco Blend

a. Available TPM can be lowered 25%.

[Plaintiff's Exhibit 72]

* * *

[P. 2] We share the conviction with others that it is the pharmacological effect of inhaled smoke which mediates the smoking habit. Two independent groups of British researchers are basing their programs on this belief.

From the University of London: "Our working hypothesis is that confirmed smokers are those who desire the pharmacological effects of the alkaloids in smoke" (M.S.G. Clark, M. J. Rand and S. Vanov — Arch. Inst. Pharmacodyn. 1965, 156 #2 P. 377).

From Harrowgate: "The Pharmacological research programme of the Tobacco Research Council has so far been basically concerned with the elucidation of the nature and cause of the possible "tranquillizing" and "stimulant" properties of nicotine and tobacco smoke."

We have, then, as our first premise, that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.

In the past we at R & D have said that we're not in the cigarette business, we're in the smoke business. It might be more pointed to observe that the cigarette is the vehicle of smoke, smoke is the vehicle of nicotine, and nicotine is the agent of a pleasurable body response.

* * *

[Plaintiff's Exhibit 80]

Dr. H. Wakeham Seminar Address to R&D — Wednesday, February 17, 1971

MARKED

"WHY ARE WE ALL HERE?"

Friends of the Center:

It is a pleasure to be here this evening, and to greet you again in this eleventh year of our occupation of the Research Center. I had vague hopes at one time of passing this annual presentation to Mr. Clifford Goldsmith. He had in fact agreed to come here tonight. Then about a month ago he begged a postponement to April. So here I am again, for better or worse, as the saying goes.

Some of you have wondered about the title I have given this talk. Frankly, I labelled it in response to a request from Frances McDaniel who posted the notice. At the time I had not thought too much about the nature of the talk, but the title sounded catchy. Someone asked me if it as any religious significance. Well, it comes from a religious story I am sure many of you know — the one about the minister who was in the habit of beginning his sermon with the question "Why are we all here?" This seemed a harmless enough opening until one day he was invited to speak to the patients at the State Hospital for Insane. In thinking about his sermon there he realized that his traditional opening was quite inappropriate. So he diligently practiced and resolved to avoid it. But at the critical moment habit overcame him, and he shouted to the patients "Why are we all here?" A voice in the back of the room replied "Because we are not all there."

I wouldn't be surprised if our friends in other departments sometimes feel like saying we in Research are "not all there." Be that as it may, we are all here, [P. 2] and each of

us had better know why. We must all recognize that in some way or other each of us must be contributing to the attainment of the aims, purposes, and objectives of our Company. If that is not so, then sooner or later our failure to make that contribution will be discovered. Our existence then will be tenuous indeed.

It is no secret that the objectives of Philip Morris, like many other corporations, can simply be stated in profit and growth. These primary objectives have widespread benefits to us as employees, to the stockholders, and to our customers, and to the country at large. Our business in Research is to see to it that our activities and efforts are effective in helping to achieve these objectives. How we might improve in this direction I will discuss later.

Now it might be of interest to review briefly the progress the Company has made during the past year. 1970 was another year of phenomenal growth, especially in view of the attack of the anti-cigaret opponents. In a year when total cigaret sales barely held constant, our U.S.A. sales increased more than 11% over 1969 to the level of over $7 billion. And for the first time, Philip Morris International unit sales exceeded the U.S.A. sales with an outstanding total of 89 billion making a grand total of over 176 billion cigarets. This growth is illustrated in these curves:

SLIDE 1.

Philip Morris is now truly an international company, competing vigorously on a worldwide basis with British American Tobacco and Rothmans.

SLIDE 2.

Here is shown distribution of our international market. In the domestic market, the [P. 3] big winner is Marlboro with a unit sales gain of 16.4%, more than any other brand, and as this chart shows, now the third largest selling brand in America, soon to be second.

SLIDE 3.

This kind of success has pushed Philip Morris-U.S.A. into third place. We will soon be second as the next slide shows.

SLIDE 4.

It is no surprise then that our healthy cigaret business, plus a price increase, plus the addition of business from our diversified lines, has pushed our 1970 consolidated revenues to a breathtaking $1.5 billion, an increase of 32.1% over 1969. We have had an equally good growth in net earnings to 77.5 million dollars, an increase of 32%. To keep up this kind of growth, shown on the next slide, is going to take some doing.

SLIDE 5.

The momentum, especially with Marlboro, is high. We must do everything we can to protect it. I am sure you are all aware that, with all due respect to diversification, cigarets are still our big business.

SLIDE 6.

In July of last year we acquired the remaining half of Miller Brewing Co. so that all of its earnings and revenues added to our totals. But in relation to cigarets, these others are still relatively small, despite the fact that in their own rights they are very respectable businesses.

SLIDE 7.

In fact, last year they did not do as well as we had hoped. General products is still not a profitable area. Miller Beer was better in sales than the previous year, but less profitable because of higher costs and promotional expenses. Mission Viejo felt the depressed economy of Southern [P. 4] California. In sum, the contributions of the diversified elements are large in revenues and small in profits.

It is clear from all this that cigarets is still the main and most important of Philip Morris business. Accordingly, the major part of our effort must be in the same direction. It is, therefore, logical for R&D to be functionally in its present relationship to Philip Morris — U.S.A. as shown in this organization chart of the next slide.

SLIDE 8.

Operationally R&D should lead to new cigaret products which are made for the U.S.A. market in the manufacturing department next door. Another reason is that, generally speaking, product development is pioneered in the U.S. before it spills over into the International sector.

In several ways 1970 has been a noteworthy year for the Research Center. First and foremost, we are beginning to see some real payout to the Company from its R&D Investment. Perhaps the most certain at present is the adoption of our TFP process for making reconstituted tobacco sheet by Philip Morris Australia. Their plant is starting this week. It is estimated that this process will in ten years permit a tobacco savings of 17.7 million dollars. Pretax profit [from TFP] for this period is expected to be 11.7 million dollars. Our research investments for this process is probably in excess of two million dollars. If the payback is five times the cost the venture will be well worthwhile. We have waited long for this application, and hope it will be repeated in other places to further increase our return.

Multifilter cigaret is a product which clearly carries the imprint of R&D, the [P. 5] first of what we hope will be many more to come. In 1970 Multifilter sales were about 3.2 billion units. This was scarcely 0.6% of the market. Yet these sales amounted to nearly 31 million dollars in revenue and a marginal contribution of 4.6 million dollars. Unfortunately, the margin is not all profit. Out of it comes marketing, general administration, and research costs before profit. But the example illustrates the tremendous value of a suc-

cessful cigaret brand. Both the Mark VII and the New Land brands also have the imprimatur of R&D on them. Unfortunately, neither has made a go in the market place. I won't speculate as to the reasons for either. Suffice it to say, both of these were promising candidates. If we can deliver more that have equal promise, sooner or later one will make a strike in the market. Then we will have a major brand to our credit.

Certainly, of current activities, the expanded tobacco program is one of the most promising in terms of reduced costs and profits. At a projected utilization rate of 5% by weight of expanded tobacco in the blend the reduction to tobacco costs could be 20 million dollars per year for PM-USA. The beautiful feature of this program is that it is not subject to the vagaries of the market place. Here we are certain that we will be able to expand tobacco and to get it into the product. The project will be a success. It deserves our utmost effort to assure that the schedule will be met. I will talk about this more later.

Finally, it is noteworthy that the management of Philip Morris has reaffirmed its confidence in R&D by continuing to provide the best of tools and facilities to do our jobs. This last year, as you all know, we installed a powerful computer to upgrade our instrument facility. We also started construction [P. 6] on a fine new laboratory tower which will increase our available space by [over] fifty percent. Our library, our research divisions, and our service groups will have new quarters in that building. We will have a seminar lecture room seating over two hundred. We will also make some changes in the upper floor of this building to provide better quarters for administrative services, a new and larger conference room, and better reception area for our visitors. I have to report that our building program is a little behind schedule, but we still hope to be finished to accommodate the move from the Main Street building by November of 1972.

I might add that by the time all this is finished the total capital investment of the Company in research will have exceeded [fifteen] million dollars.

[P. A] Our management is counting on R&D to provide the technical basis for achieving corporate goals. Now that Philip Morris, with its present momentum in the cigaret business will in all probability be second in 1971, the next goal will be to overtake R.J. Reynolds as the industry leader. This will require us to employ our technical resources to gain product leadership in the industry. Product leadership, in the absence of broadcast advertising, will require product advances with real competitive advantages.

[SLIDE 9.]

Translating this situation into R&D goals I would list the following areas of importance.

1. Basic filter science and applied filter technology. We need to know more about the science of both aerosol and gaseous filtration as applied to the cigaret. We have only touched on [illegible] of fibers, polymers, absorbents, and filter geometry to obtain controlled, selective action in cigaret filters.

2. Control of smoke formation and composition. We have only begun to probe the mechanisms of combustion, pyrolysis, and distillation in the smoke formation process, the effects of burning temperature, tobacco composition, salt components, and cigaret geometry and their effects on smoke composition.

3. Flavor science and subjective response. You have all been aware of the need to increase subjective response to low tar delivery products. You are also aware of the extensive knowledge we have of smoke composition. And yet, we know very little about which constituents contribute positively to the smoker's response, which detract, or which make no contribution. In fact, even for nicotine we are not

confident of the role it plays in our [P B] product acceptability.

4. Smoker characteristics and behavior. We need to strengthen our understanding of the inter-relationship between cigaret smoking and certain psychological, social, life style, genetic, and occupational factors. We need to understand more about why people smoke and what benefits they obtain from smoking.

5. Tobacco utilization. Both reconstituted tobacco and expanded tobacco have extended our ideas about tobacco utilization. When I first came into this business I commented on how ridiculous it was to burn a gram of tobacco, when all the smoker wanted came from one-tenth as much. And yet, when economics forced reconstituted tobacco on us as a way to use byproducts, we learned precious little about the effects of sheet composition, geometry, smoke generation conditions on smoke composition. We were engrossed in the technology, the brute force approach to make the process go. The experience was repeated with TFP. Now we are at again with expanded tobacco. We are discovering how little we know about the raw material in our product. We should remedy that ignorance, before the next technological crisis.

6. Biological effects. We are gradually emerging from the "dark ages" when it was considered harmful to be knowledgeable about the biological effects of smoke and its components. Maybe we have learned from crises past that it is better to be informed about potential dangers then to be silenced by ignorance. How else can we reply to our critics? Hand in hand with our increasing knowledge of smoke composition must go our better understanding of the effects on biological systems. Not with the objective of proving smoke to be harmful or harmless, but from the aim of making our product more acceptable to that complex biological system — the smoke [P. C] Without that kind of guidance, our efforts at controlling smoke composition are meaningless.

7. Non-tobacco cigaret filler. I look on this as a long-range program aimed at perfecting a non-tobacco filler material with smoking characterists acceptable to the smoker. We may never use it, maybe because we may have to prove safety, as with a new drug. I look on it as an insurance item and as a useful research tool in our understanding of the smoker.

So you have here seven main areas of work which are enough to keep us busy for a long time. And yet they are not all. But I have not time to go into everything.

Finally, I want to say a few things about our fold favorite subject — Smoking and Health.

From this standpoint, 1970 might very properly be called the year of the beagle. Early in the year, the American Cancer Society announced that they had finally demonstrated the formation of lung cancer in beagles by smoke inhalation in the now infamous Auerbach and Hammond study. I am sure all of you have read extensively about this in the newspapers, how the industry asked to have an independent panel of pathologists review the histological sections showing cancer, how the Society refused, how generally the ACS was put on the defensive, how publication was refused by two medical journals and how the story was changed somewhat by the time it was published in the Archives for Environmental Medicine. [P. 7] You may not realize the importance of this chain of events for the industry. You will recall that the argument supporting the health condemnation of cigarets is based on two points. First is that epidemiological studies show a strong statistical association between heavy smoking and lung cancer for males. Second is that when the condensate of cigaret smoke is painted on the backs of mice for the better part of a lifetime they develop warts or tumors and sometimes carcinomas. Presumably this latter experiment has given biological support to the statistical evidence and hence "proves" the causation hypothesis. The cigaret indus-

try has assailed the mouse skin study as having no significance to cigaret smoke and human lung cancer. There are at least three things wrong with the test: one is that mouse skin is not human lung tissue. Second is that smoke condensate has different chemical composition from inhaled smoke. Third is that painting is not the method of application practised by human smokers.

The logical extension of these objections is that an inhalation test in which an animal breathed smoke like a human would be a better model system. Presumably in such a test, the formation of lung cancers in the test animal would be strong evidence for the cigaret causation hypothesis. That is why the beagle test was a critical one. To be sure, beagles are not people. Furthermore, in the test they inhaled the smoke through openings in their throats instead of through their mouths or noses. As a result they had high concentrations of smoke near the openings. Then they puffed rapidly and got no telling what kind of smoke. Finally, the so-called tumors were microscopic neoplasms. So the test was not conclusive. But it was a lot closer than skin painting.

The strong opposition of the industry to the beagle test is indicative of a new, [P. 8] more aggressive stance on the part of the Industry in the smoking and health controversy. We have gone over from what I have called the "vigorous denial" approach, the take it on the chin and keep quiet attitude, to the strongly voiced opposition and criticism. I personally think this counter-propaganda is a better stance than the former one. We need to call attention to the exaggerations and lies of the anti-cigaret zealots. We need to give the scholarly reply to the improper studies. We need to stress the benefits that sixty million smokers derive from the use of our products. I believe every smoker has been informed about smoking and health. Those who smoke have made their decision to accept the real or imaginary risks. We need to uphold the right of the smoker to make his own decisions instead of having Government bureaucrats make them for him.

As you know, 1970 was also the year of the new warning label on the package and the last year of TV and radio advertising of cigarets. Just what effect these actions will have on cigaret sales remains to be seen. Certainly the advertising ban will make the introduction of new brands more difficult. But new ways of marketing are being found. We also have the experience of other countries with similar bans that cigaret sales continue as before. We do not, therefore, anticipate a drop in sales as a result of the ban.

One more word about skin painting. It is really unimportant whether this or any other bioassay method involves what we would accept as a proper smoking and health model. The important thing is what the public and especially the medical and legislative public think. If the test has relevance to them, then we must be prepared to cope with it. In this connection we must view the skin painting tests carried out abroad which appear to show that reconstitution of tobacco by certain methods somehow modifies the chemistry of the smoke to [P. 9] give a lower tumor yield in a standardized test. The threat of this kind of a finding challenges us to discover how the chemistry is changed by the reconstitution process. This challenge will require a lot of diligent effort on the part of our analytical chemists.

The demands for new scientific and technological knowledge about our processes and products are never ending. This is the business of research. This is "why we are here." This is our challenge — to use the resources placed at our disposal to contribute most effectively to Company growth and profit.

[Plaintiff's Exhibit 83]

May 1, 1972

MEMORANDUM

TO: Horace R. Kornegay

FROM: Fred Panzer

SUBJECT: The Roper Proposal

GENERAL COMMENTS

It is my strong belief that we now have an opportunity to take the initiative in the cigarette controversy, and start to turn it around.

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts — litigation, politics, and public opinion.

While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not — nor was it intended to be — a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

— creating doubt about the health charge without actually denying it

— advocating the public's right to smoke, without actually urging them to take up the practice

— encouraging objective scientific research as the only way to resolve the question of health hazard

On the litigation front for which the strategy was designed, it has been successful. While we have not lost a liability case, this is not because juries have rejected the anti-smoking arguments.

On the political front, the strategy has helped make possible an orderly retreat. But it is fair to say that it [P. 2] has not stemmed the pressure for new legislation, despite the major concessions we have made.

On the public opinion front, however, our situation has deteriorated and will continue to worsen. This erosion will have an adverse effect on the other fronts, because here is where the beliefs, attitudes and actions of judges, juries, elected officials and government employees are formed.

THE STRATEGIC IMPASSE

As an industry, therefore, we are committed to an ill-defined middle ground which is articulated by variations on the theme that, "the case is not proved." As the recent history of U.S. involvement in Vietnam demonstrated, it is impossible to hold the public on a middle course for any length of time. There seems to be no way that mass public opinion can engage in a controversy and choose an answer that goes beyond the range of either/or.

In the cigarette controversy, the public — especially those who are present and potential supports (e.g. tobacco state congressmen and heavy smokers) — must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor.

As things stand, we supply them with too little in the way of ready-made credible alternatives.

THE ALTERNATIVES

Two such credible alternatives exist:

1) The Constitutional Hypothesis i.e. people who smoke tend to differ importantly from people who do not, in their heredity, in constitutional makeup, in patterns of life, and in the pressure under which they live.

2) The Multi-factorial Hypothesis i.e. as science advances, more and more factors come under suspicion

> as contributing to the illnesses for which smoking is blamed — air pollution, viruses, [P. 3] food additives, occupational hazards and stresses.

Our 1970 public opinion survey showed that a majority (52%) believed that cigarettes are only one of the many causes of smokers having more illnesses. It also showed that half of the people who believed that smokers have more illness than non-smokers accepted the constitutional hypothesis as the explanation.

Thus, there are millions of people who would be receptive to a new message, stating:

> Cigarette smoking may not be the health hazard that the anti-smoking people say it is because other alternatives are at least as probable.

The Roper Proposal would be a persuasive (if not strictly scientific) medium for this message, which we have done little to develop in a systematic or comprehensive way.

Following is my outline of the steps required to start a shift in public opinion if the Roper Proposal is accepted.

A SCENARIO FOR ACTION

1) Select a panel of experts to consult on the design of the study. Ideally they would be prestige figures who would initially have a solid contribution to make and who would also be willing to endorse the study publicly at a later stage.

2) Conduct the pilot study.

3) If favorable, present the results to carefully selected members of the following key groups:

Senate

House

Cabinet

White House

State Governors

Medical School and University Presidents

Scientific bodies [P. 4]

The purpose is two-fold (a) to gain the support and participation of friends and (b) to neutralize any adverse action they may be brewing. For example: By seeing Secretary Butz at this time we might gain some degree of participation from the Agriculture Department. By seeing Secretary Richardson we might possibly forestall a PHS anti-smoking drive.

4) Conduct the full scale survey.

5) If the results are favorable, release them as a book in both hard cover and paper back version, hopefully published by a legitimate house. In effect, such a volume would be a counter-Surgeon General's Report. The principal authors would be Burns Roper and an eminent research scientist. The advisory panel — hopefully broadened as a result of Step 3 — would write the introduction. The industry's funding role would be fully acknowledged.

6) As a book the material would be marketed and promoted in all the many ways available: magazine condensation, TV and Radio talk shows, newspaper reviews and interviews, advertising, gift distribution, etc. etc.

And best of all, it would only have to be seen — not read — to be believed...just like the Surgeon General's report.

FP/kc

cc: M. Kastenbaum
W. Kloepfer, Jr.

[Plaintiff's Exhibit 91]

CHARGE NUMBER: 1600

PROGRAM TITLE: Smoker Psychology

PROJECT LEADER: W. L. Dunn, Jr.

PERIOD COVERED: April 1–30, 1974

DATE OF REPORT: May 9, 1974

Project Title: Alpha Brain Waves and Smoking
Written by W.L. Dunn

Nearing completion of data collection.

Project Title: Controlling Smoke Inhalation Post-Puff
Written by: W. L. Dunn

Still in instrumentation phase.

Project Title: Puffing Behavior
Written by: F. J. Ryan

When 16 students smoked 85mm Marlboros or Salems cut to different lengths, we observed that (1) first puffs were strikingly similar in volume, flow and duration; whether taken on an 85, 78, 71, 65, or 59 mm rod; (2) second puffs were strikingly similar, too, whether at 78, 71, 65, 59, or 52 mm; (3) later-than-second puffs had volumes which were determined by rod length, rather than puff number. In this study puffs were taken at 60-second intervals. But smokers are normally free to take puffs at any time, so that it is inappropriate to use puff number alone to categorize volumes. A third puff taken when an 85 mm rod is 71mm long will have a different volume than a third puff taken when a rod is 40 mm long. Interpuff interval and static burn rate must be taken into account.

Some summarizing and grouping of the data in several recent studies suggests that puff volume is dependant on the

weight of the smoker. Our nine heaviest student smokers had considerably larger volumes per puff than our nine lighter smokers. Most of the volume increase is attributable to differences in flow rate, but there are differences in puff duration, too. Whether this is due to general strength and vigor, to generally greater appetite, to lung capacity, or to some other factor is unknown. If we take smoke [P. 2] volume per puff, body weight, and puff by puff tar and nicotine deliveries into account, finding mg tar (or nicotine) per puff per kg of body weight—then the group differences disappear.

This suggests some type of dose hypothesis in controlling smoke volume intake.

Project Title: Smoking, Arousal, and Mood Change
Written by: T. R. Schori

Data collection continues. We had hoped to be able to obtain good heart rate data using a cassette-type recording system. That now seems unlikely based upon the many difficulties we have experienced with that system. However, these data are only a nonessential minor part of this study.

Project Title: Miscellaneous
Written by: T. R. Schori

SEF is nearly ready to go out with an RP^3 test of our DL-2 cigarettes. One of the menthol cigarettes for MN-3 is being remade.

Project Title: Regression Analysis
Written by: T. R. Schori

Having done a number of studies (JXD-1, JND-2, TNT-3, TNT-4) in which we have systematically manipulated tar and nicotine parameters of cigarettes, we are trying to see if we can make any overall conclusion. Specifically, we are trying to predict nicotine/tar ratios for optimal cigarette acceptability at differing tar deliveries.

jh

[Plaintiff's Exhibit 98]

November 3, 1977

Dr. T. S. Osdene

W. L. Dunn

Proposed Study by Levy

I have given Carolyn approval to proceed with this study. If she is able to demonstrate, as she anticipates, no withdrawal effects of nicotine, we will want to pursue this avenue with some vigor. If, however, the results with nicotine are similar to those gotten with morphine and caffein, we will want to bury it. Accordingly, there are only two copies of this memo, the one attached and the original which I have.

/s/

WLD:jh

[Plaintiff's Exhibit 106]

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: Dr. R. B. Seligman Date: March 21, 1980

From: W. L. Dunn

Subject: The Nicotine Receptor Program

In responding to your query I'm going to first address the more inclusive topic of the psychopharmacology of nicotine. Abood's nicotine receptor program is included, as is the internal nicotine analogue program and the internal animal behavior program. All three of these efforts are aimed at understanding that specific action of nicotine which causes the smoker to repeatedly introduce nicotine into his body.

The psychopharmacology of nicotine is a highly vexatious topic. It is where the action is for those doing fundamental research on smoking, and from where most likely will come significant scientific developments profoundly influencing the industry. Yet it is where our attorneys least want us to be, for two reasons. It is important to have these two reasons expressed and distinguished from one another. The first reason is the oldest and is implicit in the legal strategy employed over the years in defending corporation within the industry from the claims of heirs and estates of deceased smokers: "We within the industry are ignorant of any relationship between smoking and disease. Within our laboratories no work is being conducted on biological systems." That posture has moderated considerably as our attorneys have come to acknowledge that the original carte blanche avoidance of all biological research is not required in order to plead ignorance about any pathological relationship between smoke and smoker. There is an important distinction that has

been made here which it is well to articulate: The acute, transient, short-lived effects of nicotine upon a physiological system (among which are those effects or that effect sought by the smoker) are wholly independent of those alleged, cumulative, long-term contributions of smoke compounds to disease processes.

We are now being allowed to conduct research on the immediate effects of nicotine because of this distinction. We can work with biological systems; we can inject nicotine in rats and we can perform the surgery required for implanting cannulae. But in doing so we are engaging in research on the pharmacological action of nicotine, which brings us to the second concern of our attorneys. This is a more recent concern arising from increasingly favorable prospects for the success of a legislative effort to transfer authority for the regulation of tobacco manufacture to a Federal agency (F.D.A.) known to have interests and powers antithetical to the interests of the industry. Any action on our part, such as research on the psychopharmacology of nicotine, which implicitly or explicitly treats nicotine as a drug could well be viewed as a tacit acknowledgment that nicotine is a drug. Such acknowledgement, contend our attorneys, would be untimely. Therefore, although permitted to continue the development of a three-pronged program to study the drug nicotine, we must not be visible about it.

[P.2] I have made these observations not to ridicule but rather to emphasize the vexatiousness of the topic. Everybody is vexed. The Don Hoels and the Ed Jacobs and our corporate attorneys see their mission to be to save the industry not only from litigative demise but also now from regulatory harassment. The Leo Aboods, the Gary Berntsons and the corporate research scientists see their mission to be to hold Philip Morris poised to respond to fast breaking opportunities or dangers on this very yeasty front.

Although our counselors have perhaps not been fully apprised of the relevance to the industry of the new developments in the neurosciences,[1] I am confident that were they so they would concur with us on the need to stay abreast of developments. And staying abreast requires a heavy commitment, a commitment best maintained by an active research program.

Our attorneys, however, will likely continue to insist upon a clandestine effort in order to keep nicotine the drug in low profile.[2]

Now I'm in a position to respond directly to your query about the Abood program. So long as we must be officially heedless of the drug properties of nicotine, and cannot openly communicate with our counterparts in other laboratories, and cannot aggressively institute a large-scale neurosciences program on site, then we must have a window to the outside world. Abood's laboratory is that window. Being himself on the forefront and knowledgeable of developments as they are occurring in other laboratories, he is our informant. We need him for that. And it is as simple as that. Whatever else falls out of the arrangement (a discovery in his lab!) will be a fringe benefit.

/s/ W.L. Dunn

jh
Attachment
cc: T. S. Osdene

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[1] Perhaps they should be apprised (see attached box)

[2] Could the rationale for such a position be reviewed with them?

[Plaintiff's Exhibit 109]

PHILIP MORRIS U.S.A.

INTER-OFFICE CORRESPONDENCE

RICHMOND, VIRGINIA

To: Dr. R. B. Seligman and Directors

From: T. S. Osdene

Subject: Evaluation of Major R&D Programs

Date: August 12, 1980

In my rather prejudiced opinion, I believe that the following programs are in order of highest priority. I have not included any of the Services areas and recognize that there are many projects and sub-projects which play a vitally important role in our increased effectiveness to the Corporation.

(1) New Product Development Including Brand Development

I believe that this is the life blood of the Corporation and must of necessity be the number one priority.

(2) Biological Effects of Smoke

In view of the clouds on the horizon, we must be more aware of the activities of additives, materials, etc.

(3) Flavor System Development for Low Delivery Cigarettes with Particular Emphasis on Reaction Flavors

I believe this is vital for our stance in the marketplace and will require contributions from Research as well as Development.

(4) Modification of Tobacco Substrate with Particular Emphasis on the Denitration Processes

Again, I feel this should yield the products of the future.

(5) Nicotine Program

This program includes both behavioral effects as well as chemical investigation. My reason for this high priority is that I believe the thing we sell most is nicotine.

(6) Improved Process Development

This would include leaf expansion, laser perforation, water-in-tobacco studies, etc., etc. [P.2]

I do recognize that this list is not clearly defined by directorates or by other organizational breakdowns, but I do feel that this is the order of importance that I attach to the various programs. I shall be happy to discuss.

TSO/mro /s/

cc: Dr. E. B. Sanders
Mr. W. F. Kuhn

[Plaintiff's Exhibit 110]

September 9, 1980

MEMORANDUM

TO: Mr. Kloepfer

FROM: Mr. Knopick

Attached please find the technical review of the conference which led to Victor Cohn's "surprise" story of 8/30 that the National Institute of Drug Abuse wants "addictive" added to the cigarette warning.

Also, the tiny item in the ADAMHA newsletter which brought on Cohn's story. I do not receive that publication.

I wonder if The Institute was caught unaware on this matter.

I have spoken previously with Pollin, current head of the National Institute on Drug Abuse. In July 1980, he sent me—and I made available throughout TI and reported in the NL—a monograph on "Cigarette Smoking as a Dependence Process." In its foreward, Pollin says: "Smoking is addictive."

Other hints: In NL 233, we quoted Pollin saying that cigarette smoking is the nation's leading drug problem among youths, despite the rise in marijuana use.

In NL 188, we quoted Pollin's predecessor, Dr. Robert DuPont: "Cigarette smoking is more addictive than using heroin, hooking two-thirds of the people who ever smoke."

Isn't the question two-fold?

Did TI miss a chance to attend and present information at NIDA's 1979 meeting which developed the "addictive" language?

Did TI see ADAMHA's newsletter and was it therefore better prepared to respond when this matter became public? [P. 2] I feel badly about my own lack of intelligence-gathering in this situation. But I don't think the questions I now raise are academic. Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as "free choice" if the person was "addicted."

[Plaintiff's Exhibit 122]

2/23/82

To: Dr. T. S. Osdene

From: J. L. Charles

Comments on "Future Strategies for the Changing Cigarette",
National Conference on Smoking & Health

On February 22, 1982 (the day of the 1982 Surgeon's General's press conference on Smoking and Health), you asked me to review the subject document and provide you with comments. The comments below are those of a concerned employee with a 20-year association with PM R&D, of which the past 10 years have been directly involved with smoking and health related research. I consider myself well trained in the biological and chemical sciences and qualified to make the following comments which should be taken as constructive criticism with suggestions [P. 2] as to how to approach the solution to some of the problems. You may shred this document, have it typed as is, incorporate the suggestions in a position paper for upper management or use the documents in any way you see fit.

This company is in trouble. The cigarette industry is in trouble. If we are to survive as a viable commercial enterprise we must act now to develop responses to smoking and health allegations from both the private and the government sectors. The anti-smoking forces are out to bury us and the techniques used to attack us do not always involve good science. Their goal is to destroy the industry and any means to that end is justified (in their opinion).

[P. 3] The Surgeon General's press conference was disturbing. For the first time associations between cancers other than the lung and cigarette smoking are being made in an emphatic manner. Associating cigarette smoking with 30% of all cancer deaths should make someone sit up and take notice. The issue of sidestream smoke and the potential influence on non-smokers was also addressed and even though the scientific basis for the statements were not sound nevertheless the damage is done.

The really important fact is that in a period of decreased governmental involvement and an economic recession the pressure is not deceasing. The problem will just not go away.

[P. 4] The "Future Strategies" document is even more disturbing than the Surgeon General's comment. Terms such as — standards setting, governmental or voluntary agency guidelines, qualitative analysis of tar, emphasis on brands with very low yields, disclosure of additives, regulation of future additives — are all worthy of concern. Again, this reflects a continuing pressure on the industry and requires a strategic response.

Let's face the facts:

1. Cigarette smoke is biologically active:

   A. Nicotine is a potent pharmacological agent. Every toxicologist, physiologist, medical doctor and most chemists know that. It's not a secret.

   B. Cigarette smoke condensate applied to the backs of mice causes tumors.

   C. Hydrogen cyanide is a potent inhibitor of cytochronum oxidase — a crucial [P. 5] enzyme in the energy metabolism of all cells.

D. Oxides of nitrogen are important in nitrosamine formation. Nitrosamines as a class are potent carcinogens.

E. Tobacco — specific nonvolatile nitrosamines are present in significant amounts in cigarette smoke.

F. Acrolein is a potent eye irritant and is very toxic to cells. Acrolein is in cigarette smoke.

G. Polonium-210 is present in cigarette smoke.

H. We know very little about the biological activity of sidestream smoke.

I. We do not know enough about the biological activity of additives which have been in use for a number of years.

[Plaintiff's Exhibit 135]

PHILIP MORRIS U. S. A.

INTER-OFFICE

CORRESPONDENCE

Richmond, Virginia

To: Mr. Jon Zoler **Date:** March 17, 1988

From: Myron Johnston

Subject: Smoking Among High School Seniors

I finally got enough storage space on the computer to mount the 1985 Public Health Service (PHS) public use tape. I compared the PHS data with data from the Survey Research Center (SRC) sample of graduating seniors and found that of all of the measures of smoking among high school seniors reported by the SRC, the best predictor appears to be the one you have chosen to use: smoked within the past 30 days. Attached is an updated copy of the table showing the various measures of smoking reported by the SRC.

Survey Research Center data as predictors of future smoking

That measure is not only the best predictor of future smoking, but it appears to predict almost exactly their ultimate smoking prevalence if we assume that the ultimate smoking prevalence is reached by ages 20 to 24. Since 1980 the percent of high school seniors who reported smoking within the 30 days prior to the survey has remained virtually unchanged at about 30 percent. By the time of the 1985 PHS survey most of those people were 20 to 24 years old, and the PHS data for 20–24 year-olds show smoking prevalence of people who have graduated from high school to be 30.0 percent.

The SRC data did, however, lead to an overestimate of the magnitude of the decline in smoking prevalence. The SRC surveys show a decline in the percent who smoked in the 30 days prior to the survey from about 38 percent in the 1970s to the current 30 percent. The PHS data on 20–24 year-old high school graduates, by contrast, show a much smaller decline, from 32.7 percent in 1979 to 30.0 percent in 1985. I think there are several possible explanations for the fact that the SRC data show a greater decline than the PHS data.

Reasons for overestimating the decline

I think the most important reason why the SRC data led to an overestimate of the magnitude of the decline in smoking among 20–24 year-olds is that there has been a delay in the onset of smoking. A subsample of each graduating class is followed after graduation. They are contacted one and one-half, three and one-half, five and one-half and seven and one-half years after graduation. In the case of the class of 1977, there was about a three percent increase in the percent who smoked daily between the time of high school [P. 2] graduation and the first re-contact one and one-half years later, after which the curve levels off. Subsequent classes have shown a much sharper increase in the percent who smoked daily during the first one and one-half years after graduation, and a slightly greater increase during the following two years, but, by the time they had been out of school for three and one-half years, they still had not reached the rates of those who graduated prior to 1980. Thus there has been an increase over time in the percent who began to smoke after graduation from high school.

The tendency to delay the onset of smoking is occurring in school as well. I examined the cumulative incidence of beginning smoking for the classes surveyed by the SRC. While the proportions of the classes of 1981 through 1985 who had begun to smoke by 12th grade are virtually identi-

cal, fewer members of each succeeding class started earlier than 12th grade. In addition, of those who had started by 12th grade, a larger proportion of the members of the class of 1985 than of the earlier classes were still smokers at the time of their graduation. Thus there has been less quitting while still in high school, which suggests to me that much of the decline was among the more casual smokers who were less committed to smoking in the first place. Thus the smaller decline in smoking prevalence of 20-24 year-olds than of high school seniors appears to be largely the result of a delay in taking up smoking coupled with lower rates of quitting.

Causes of the decline in smoking among high school seniors

The theory that I put forth in an earlier memo to explain the decline in smoking among high school seniors remains my best guess: That it was caused by the sharp increase in the price of gasoline. In comparing the cumulative smoking incidence of the high school senior males in the classes of 1976 and 1979, I found them to be about the same up to the age of 16, but after age 16 (the age at which many of them would have access to a car) the 1979 incidence was substantially below that of 1976. In 1967 it was possible to buy two gallons of gasoline and a pack of cigarettes for one dollar, and as recently as 1978, if incomes kept pace with inflation, the same purchasing power would still buy two gallons of gasoline and a pack of cigarettes.

By 1980 the same purchasing power would not even buy the two gallons of gasoline. When it comes to a choice between smoking cigarettes or cruising around in his car, the average red-blooded teenage American male would probably choose the latter. In that earlier memo I speculated that the stabilization of gasoline prices might result in an end to the decline in cigarette smoking among high school senior males. As it happens, the end of the decline in smoking prevalence did coincide with the stabilization of gasoline prices, and the

fact that smoking prevalence has been inching up since 1981 among whites lends some credence to the gasoline hypothesis. The gasoline hypothesis could also explain the increase in the proportion who begin to smoke after high school graduation: After high school graduation many young people go to work full time and thus have the money to buy both the gasoline and the cigarettes. [P. 3]

There are also certain behaviors that have roughly paralleled the trends in smoking among high school seniors. The percent who reported that they rode around in a car nearly every day declined with the decline in cigarette smoking from 1978 to 1981, as a result, no doubt, of the gasoline price increases. This could have been causally related to the decline in smoking, since teenagers for decades have been using their cars to engage in activities disapproved by their parents. Another thing that declined as smoking declined was getting together with friends informally. This may have been related to the gasoline shortage and price increase, and probably resulted in less contact with others who smoked and in fewer occasions for smoking.

Smoking is negatively related to active sports participation. During the period when smoking was declining among high school seniors, athletic participation was increasing, and the end of the decline in smoking prevalence coincided with a decline in athletic participation. There is probably a very real causal relationship here; since smoking is universally discouraged in high school athletic programs.

Dropouts

As we discussed, one shortcoming of the SRC data is that high school dropouts are, by definition, not surveyed. Dropouts account for about 12 percent of whites and 20 percent of blacks, and dropouts are much more likely to smoke than people who graduate from high school. The 1985 PHS data show that of the 20–24 year-old dropouts, 57.5 percent of the whites and 55.4 percent of the blacks smoke, while among

20–24 year-olds who graduated from high school, 30.6 percent of the whites and 27.9 percent of the blacks smoked. This means that the SRC data, relative to the PHS data for 20–24 year-olds, very accurately estimate ultimate smoking by whites but underestimate smoking by blacks at ages 20–24 by nearly six percentage points.

This seems reasonable in light of some other data I have. The National Longitudinal Survey of Children and Youth (NLS) asked, in 1984, the age at which the 12686 respondents (then aged 19 to 27) first tried a cigarette. This clearly is not the same as asking the age at which they first started smoking regularly, but blacks reported first trying a cigarette, on the average, two years later than whites (see chart attached). By age 21 black males have caught up with whites, but the proportion of black females having tried a cigarette never reaches the level of white females. I split the NLS sample of blacks into three age cohorts and found that this lag between blacks and whites appears to be increasing. Thus while most whites who smoke have started before age 21, blacks appear to continue to take up smoking well into their twenties.

Nonetheless, the much greater decline in smoking prevalence among blacks is real, and the SRC data did predict accurately the greater decline in the proportion of blacks who smoke. The PHS data show that among high school graduates ages 20 to 24, 32.7 percent of whites and 33.0 percent of blacks smoked in 1979, with declines by 1985 to 30.6 and 27.9 percent respectively. This has serious implications for the menthol market, since 90 percent of black smokers under the age of 30 smoke a menthol. The only brands of ours that would suffer from a decline in smoking among young blacks are the menthol versions of B&H and Virginia Slims, since B&H, in particular, has a good following among young black females. [P. 4]

Other comparisons of Survey Research Center and Public Health Service data

The SRC data come very close to predicting the percent of female high school graduates aged 20 to 24 who smoke (30.7 percent), but underestimate the percent of male smokers (29.4 percent). The reason for this, based the SRC recontacts of the people they first surveyed as high school seniors, is that it is the males, in particular, who are delaying the onset of smoking. Thus, while a smaller proportion of them smoke as high school seniors, by age 21 the proportion who smoke has not declined as dramatically as the proportion who smoked in high school. It seems reasonable that the car and athletic participation effects mentioned above would have a greater effect on males than on females in depressing smoking prevalence in high school.

At first glance the SRC data appear to result in an slight underestimate of smoking among 20-24 year-olds who did not go to college (41.1 percent in 1985), and an overestimate of smoking prevalence among those who did (17.9 percent). This is not necessarily the case, however, for the question regarding college plans referred specifically to four years of college, and, in any case, it is quite possible that the plans of some failed to materialize. Regionally, the SRC data lead to an overestimate of the percent of 20-24 years who will smoke in the Northeast (30.7) and the Midwest (30.4) and an underestimate in the South (30.5) and West (28.2).

Overall, I am quite pleased with the close correspondence between the data from the SRC and the PHS. Clearly the correspondence is closest in the groups with the larger sample sizes — the total, whites, males and females — and poorest where the sample sizes are smaller — blacks and the individual regions. Now that I have had a chance to look at the PHS data and compare the two data sources I am even more confidant than before that we can use the data on high

school seniors to predict trends in smoking among young adults.

MEO:f

/s/

cc: Ed Gee
Ken Houghton
Carolyn Levy
Jim Myracle
Jack Nelson
John Tindall
Larry Wexler
Central File

[page 5]

SMOKED IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	37.8	37.4	38.9	Na	na	41.2	39.6	36.2	36.3	na	na
1976	38.8	37.7	39.1	38.3	39.7	41.8	41.3	39.1	28.3	39.8	46.4
1977	38.5	36.7	39.7	38.4	38.4	43.0	40.8	37.8	37.8	38.6	46.4
1978	36.7	34.5	38.1	37.0	31.5	40.9	39.0	35.7	27.4	37.4	44.6
1979	34.4	31.2	37.1	34.9	28.7	37.0	36.0	35.4	24.8	36.0	43.1
1980	30.5	26.8	33.4	31.0	25.2	34.1	31.9	31.9	21.1	32.3	39.6
1981	29.4	26.5	31.5	30.1	22.3	31.5	32.3	28.9	21.8	27.9	38.1
1982	30.0	26.8	32.6	31.3	21.2	37.1	34.5	29.4	20.4	32.1	38.2
1983	30.3	28.0	31.6	32.3	21.2	34.6	33.2	28.7	21.8	23.3	38.0
1984	29.3	25.9	31.9	31.0	17.6	33.8	31.4	28.6	22.9	25.7	37.9
1985	30.1	28.2	31.4	31.7	18.7	34.2	34.1	25.6	26.3	22.8	40.5
1986	29.6	27.9	30.6	32.0	14.6	35.2	32.5	26.1	23.3	24.0	38.5

SMOKED ONE OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	27.0	27.1	26.9	Na	na	31.5	28.7	26.2	17.3	na	na
1976	28.6	28.0	28.8	28.8	26.7	32.2	30.2	29.1	19.4	29.7	36.2
1977	29.0	27.9	30.1	29.0	23.7	33.8	29.6	28.9	19.2	29.5	37.4
1978	27.5	26.0	28.2	27.7	22.1	32.6	28.6	26.4	19.1	28.3	35.1
1979	25.3	22.8	27.8	25.9	19.4	28.6	26.9	25.8	16.9	27.0	33.9
1980	21.3	18.6	23.4	21.8	15.9	24.2	22.0	22.7	13.9	13.8	29.9
1981	20.2	18.1	21.8	20.9	13.6	23.3	22.9	18.9	13.1	12.8	29.4
1982	21.1	18.8	23.2	22.4	12.4	23.3	24.0	20.4	12.7	13.2	29.5
1983	21.1	19.1	22.2	22.0	12.6	26.1	23.4	19.4	13.0	13.8	29.4
1984	18.7	16.1	20.5	20.0	9.0	23.6	20.3	17.7	12.4	11.9	27.2
1985	19.4	17.9	20.6	20.7	10.8	24.9	22.4	15.9	14.2	12.5	29.8
1986	18.7	16.9	19.8	20.4	7.8	24.9	19.9	15.8	13.4	12.7	28.2

BEST AVAILABLE COPY

[page 6

SMOKED HALF A PACK OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	18.0	19.8	16.1	na	na	22.2	19.0	16.9	17.3	na	na
1976	19.1	19.9	18.0	20.1	11.7	22.4	20.2	19.0	12.4	11.8	25.5
1977	19.6	19.9	19.0	20.6	10.2	24.2	20.8	18.7	11.5	11.4	27.2
1978	18.7	19.0	18.0	19.7	9.5	23.7	19.8	17.0	12.2	11.1	25.4
1979	16.4	15.4	17.1	17.3	8.4	19.7	17.4	16.1	10.7	9.7	23.3
1980	14.3	13.5	14.7	15.1	6.1	17.0	15.4	14.6	8.3	8.2	21.3
1981	13.5	12.8	13.8	14.6	5.6	16.6	16.0	11.8	7.2	7.5	20.8
1982	14.2	13.1	14.7	15.6	8.2	15.5	17.3	13.3	7.1	7.8	21.0
1983	13.7	13.0	13.7	14.9	4.6	16.6	17.1	12.4	6.4	7.6	20.9
1984	12.3	11.1	12.9	13.5	3.7	17.4	12.9	11.3	7.4	6.5	19.6
1985	12.4	12.4	12.	13.6	4.1	17.0	14.9	9.6	7.6	6.6	20.9
1986	11.3	10.6	11.6	12.7	2.9	15.6	12.4	10.0	6.5	6.4	19.1

SMOKED A PACK OR MORE PER DAY IN PAST 30 DAYS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	9.7	11.7	7.9	na	na	12.8	10.5	8.8	4.9	na	na
1976	9.8	10.8	8.8	10.7	2.7	11.5	10.8	9.8	5.9	5.3	13.8
1977	10.4	11.4	9.3	11.4	2.6	12.7	11.2	10.2	5.4	5.7	15.0
1978	9.7	10.9	8.5	10.6	2.4	12.9	10.3	8.3	6.5	5.3	13.8
1979	8.4	8.2	8.5	9.1	2.3	10.4	9.0	8.4	5.0	4.4	12.7
1980	7.4	7.7	6.9	8.1	1.8	8.9	8.4	7.5	3.5	3.9	11.5
1981	7.1	7.0	7.0	8.0	1.7	9.3	8.8	5.6	3.2	3.6	11.8
1982	7.4	7.3	7.1	8.5	1.1	7.9	9.8	6.7	2.9	3.8	11.2
1983	7.3	7.3	7.0	8.3	1.2	8.3	9.7	7.0	2.7	3.8	11.3
1984	6.6	6.6	6.2	7.4	0.8	9.5	7.0	6.1	3.5	3.1	11.1
1985	6.6	7.0	6.2	7.5	1.0	9.2	8.3	5.1	3.3	3.3	11.4
1986	5.9	5.8	5.8	6.8	0.8	7.8	6.7	5.4	3.1	2.9	10.8

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CURRENT REGULAR OR OCCASIONAL SMOKERS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	38.4	38.8	37.6	na	na	40.5	41.5	38.1	28.6	na	na
1976	40.4	38.9	41.4	40.9	37.1	41.5	44.1	39.4	31.9	32.9	46.8
1977	40.2	38.4	41.6	40.5	34.9	44.5	42.8	39.0	30.2	32.1	47.1
1978	39.0	36.3	41.2	39.8	31.7	42.2	41.0	38.9	29.6	31.0	46.0
1979	36.8	33.2	39.6	37.2	28.5	38.7	39.4	37.5	27.6	29.4	44.2
1980	32.9	29.3	35.7	33.6	25.2	35.5	34.6	33.9	24.0	25.9	40.9
1981	32.5	28.7	35.7	33.8	23.2	33.9	36.0	31.6	25.0	26.2	40.3
1982	32.7	28.8	36.2	34.2	22.7	34.4	36.4	32.1	23.8	26.1	40.1
1983	33.1	29.7	36.0	34.5	23.4	37.6	37.2	31.2	24.1	27.0	40.2
1984	32.1	27.8	35.5	34.1	19.6	35.4	34.6	31.0	26.3	26.4	39.4
1985	32.4	29.7	34.5	34.7	19.1	36.3	36.8	27.5	29.1	26.8	41.1
1986	31.8	29.8	33.5	34.5	16.0	35.9	34.6	29.1	26.8	27.4	39.8

CURRENT REGULAR SMOKERS

		Sex		Race		Census Regions				College Plans	
	Total	Male	Female	White	Black	NE	NC	South	West	Yes	No
1975	22.0	22.2	21.8	na	na	26.8	23.1	21.1	13.7	na	na
1976	23.5	22.5	24.1	23.9	20.7	26.3	25.2	23.6	15.4	16.9	30.4
1977	23.9	22.1	25.2	24.3	17.7	28.8	24.2	23.3	15.1	15.4	31.5
1978	22.8	21.1	24.0	23.5	16.3	28.0	24.3	20.9	15.2	14.4	30.2
1979	20.3	17.4	22.5	20.9	13.5	23.5	22.0	20.0	12.9	13.1	27.5
1980	17.4	15.0	19.2	18.1	11.0	20.1	18.5	17.8	10.7	10.9	24.6
1981	16.4	14.4	17.7	17.3	9.0	19.2	19.0	15.0	9.7	10.0	24.1
1982	17.0	14.4	19.0	18.2	9.2	18.9	20.1	16.0	9.3	10.2	24.8
1983	17.0	14.8	18.3	17.8	8.4	21.1	19.8	15.0	9.7	10.7	24.2
1984	15.1	12.7	16.7	16.4	6.6	19.5	16.7	13.9	9.5	9.2	22.5
1985	15.8	14.0	16.5	16.5	7.5	20.3	18.1	12.3	10.9	9.2	24.5
1986	14.5	12.6	16.0	16.0	5.1	19.8	15.4	12.4	9.7	9.4	22.6

[page 8]

EVER SMOKED CIGARETTES

		Sex		Race			Census Regions			College Plans	
	Total	Male	Female	White	Black	NS	NE	South	West	Yes	No
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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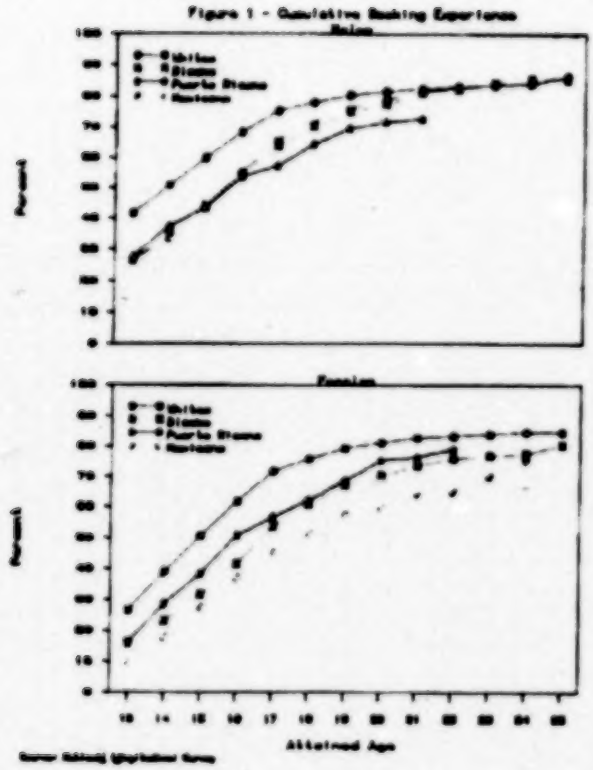


[Plaintiff's Exhibit 144]

PHILIP MORRIS USA

INTEROFFICE CORRESPONDENCE

120 PARK AVENUE, NEW YORK, NEW YORK 10017

TO: William I. Campbell DATE: 10/2/92

FROM: Carolyn Levy

SUBJECT: Smoking Cessation Technology

I agree that the market appeal and profit margins of nicotine patches will heighten the already active efforts by drug companies to develop smoking cessation technologies. PM USA's R&D department has been following this area worldwide for many years by monitoring patents, scientific publications, presentations at scientific meetings and news releases, as well as by having discussions with colleagues in the academic community. We have the expertise in-house to interpret findings from these various sources and predict the potential implications for our business.

In the past, smoking cessation efforts generally have taken four different approaches: nicotine substitution, blockage of nicotine receptor sites, alleviation of "withdrawal" symptoms and smoking deterrence using, for example, drugs to change the taste of smoke. Today, nicotine substitution (through skin patches, nasal sprays or inhalers), usually coupled with some kind of behavioral therapy, seems to be the avenue that most drug companies are pursuing.

Available data suggest that nicotine gum/patches are only minimally effective in helping smokers quit unless combined with behavioral therapy. Despite this, there are reports that many doctors are prescribing patches alone, suggesting that

their maximum effectiveness will not be realized. Many people feel that because of the need for behavioral intervention as a component of smoking cessation, which is both costly and time consuming, it is unlikely that a truly effective, readily available "habit breaker" will be developed.

Potentially more effective forms of nicotine substitution are nicotine nasal sprays and inhalers, since their patterns of nicotine absorption more closely resemble cigarette smoking. The Lancet reported that this property suggests that they may have more "dependence potential" so that some smokers will merely substitute sprays/inhalers for cigarettes.

The medical community's reaction to this type of substitution is difficult to predict. However, there are indications that in the U.K. it may be viewed as the lesser of two evils. For example, an editorial in The Lancet in May, 1991, stated, "There is no good reason why a switch from tobacco products to less harmful nicotine delivery systems should not be encouraged." And as reported in the N.Y. Times last month, Dr. Godfrey Fowler, a smoking cessation specialist at Oxford University said, "It's certainly safer to get nicotine clean from a spray than dirty from tobacco." [P. 2]

There is a growing body of research demonstrating nicotine's positive influences on information processing and memory in addition to animal studies which suggest that nicotine may benefit Alzheimer's patients. These findings, combined with the lack of evidence that nicotine is harmful in doses achieved through smoking, suggest that nicotine substitution technologies may have wider marketplace applicability than solely as smoking cessation aids.

It is interesting to note that the factors which are affecting our business today are quite similar to those that preceded the transition from chewing tobacco to cigarette smoking. In the late 1800's there were health concerns related to the spread of tuberculosis through spitting and the social acceptability of chewing declined as the U.S. population became more urban.

This suggests that at the very least we should have contingency plans for a change in the predominant form of nicotine usage. If the market were to broadly redefine our business as "the delivery of nicotine in an aerosol", the development of alternative delivery mechanisms, substrates, flavors, etc. would make sense. We currently have R&D projects underway to pursue some of these goals, as well as a task force that has been given the responsibility of putting together a business plan for one product which is nearing final prototype development.

Regarding the news of research on a pill to block the craving for cocaine, Dr. Chris Fibiger, the medical researcher referenced in the report, currently is not working on nicotine. In the future we believe he intends to see if the neural circuits for cocaine craving also mediate the desire for other substances, including nicotine. If these circuits do mediate nicotine intake and they could be blocked, then it is possible that cigarettes' appeal would decline.

We have detailed information available on all of the topics I have touched upon. Please let me know if you would like to have a more in-depth discussion.

CL/gt
/s/ Carolyn

cc: John R. Nelson

[Plaintiff's Exhibit 148]

Study Finds Promise in Regimen for Treatment of Bone Disease

2 States Limit Dairies' Use Of Hormone

SMOKERS AND NON-SMOKERS

FACTS YOU SHOULD KNOW

Fact:

Fact:

Fact:

Fact:

Fact:

Philip Morris USA

SMOKERS AND NON-SMOKERS:

FACTS YOU SHOULD KNOW

Both smokers and non-smokers deserve to know facts, not innuendo, about cigarettes. Yesterday, Philip Morris and other U.S. tobacco manufacturers helped to set the record straight by speaking before a Congressional committee. For your consideration, here are the highlights of the information presented by Philip Morris in that session:

Fact:

Philip Morris does not add nicotine to its cigarettes. The nicotine delivery of all commercial cigarettes is measured and disclosed to one tenth of a milligram, both in public releases by the Federal Trade Commission, and in very advertisement for the last 25 years. In the end, Philip Morris lowers the amount of nicotine naturally occurring in tobacco by between 50% in the case of a Marlboro, and 90% in an ultra-low brand.

Fact:

Philip Morris does not "manipulate" nicotine levels. We voluntarily opened our manufacturing operations to the Food and Drug Administration, in a good faith effort to resolve the allegations that we add nicotine or control its level in our cigarettes.

Our manufacturing process includes over 400 quality control checkpoints and only two of them measure nicotine. In every case, and with every brand we manufacture, the nicotine level in the finished cigarette is lower than the nicotine level of the original, natural tobacco leaf.

Fact:

Philip Morris has not used patented processes to increase or maintain nicotine levels. Philip Morris, like every other corporation, applies for, and obtains patents on virtually every innovation we pioneer. Philip Morris currently holds

over 600 patents. They are publicly disclosed upon issuance through the U.S. Patent Office. Philip Morris has never used any of these patents to increase, or even maintain, nicotine levels in any of its products. In fact, the only nicotine related patents Philip Morris has ever used are for the reduction of nicotine.

Fact:

Philip Morris does not believe cigarette smoking is additive. People can and do quit smoking all the time. According to the 1988 Surgeon General's Report, there are more than 40 million former smokers in the United States and 90% quit on their own, without any outside help.

Fact:

None of the ingredients added in the manufacture of cigarettes is harmful as used. Cigarette ingredients have been scrutinized by the Department of Health and Human Services since 1986. In addition, an independent safety assessment was conducted by six renowned scientists. Their report concluded: "The ingredients added to tobacco in the manufacturer of cigarettes by the six major U.S. manufacturers are not hazardous under conditions of use."

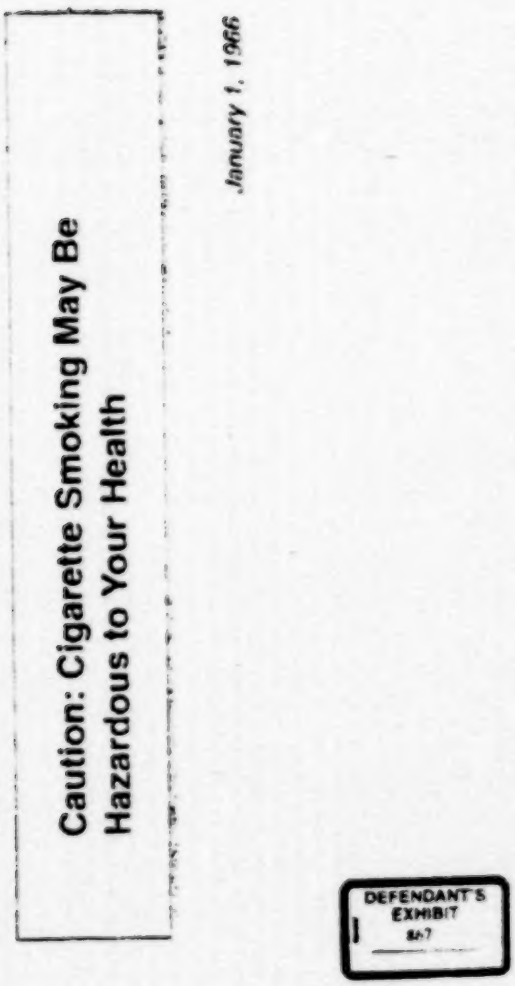
In closing, we'd like to offer one more fact about how the majority of Americans feel about smoking bans. According to a recent CNN/USA Today poll, the majority of non-smokers, as well as smokers, are opposed to outright smoking bans. In fact, almost 7 out of 10 Americans favor designated smoking areas. Obviously, non-smokers feel that smokers have rights, too.

For a full transcript of the information presented by Philip Morris, the ingredients list, or further information, please call 1-800-852-8749.

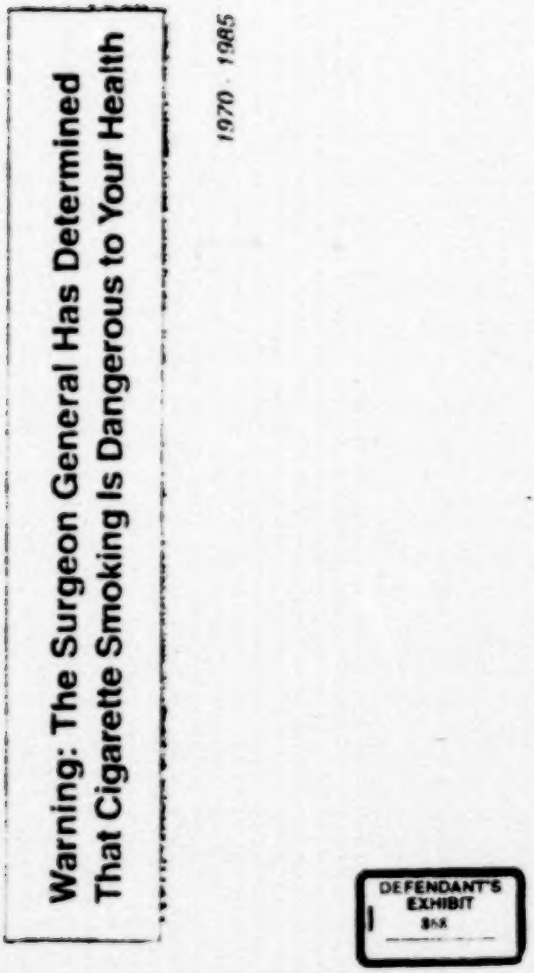
Philip Morris USA

DEFENDANT'S EXCERPTS OF RELEVANT TRIAL EXHIBITS IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

[Defendant's Exhibit 867]



[Defendant's Exhibit 868]



[Defendant's Exhibit 869]

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

PUNITIVE DAMAGES — PRODUCTS LIABILITY

I will now instruct you on punitive damages. If you find that Marlboro cigarettes are a defective product or that the defendant is guilty of negligence or fraud, you must consider whether to award punitive damages.

Punitive damages may be imposed only if the plaintiff has satisfied you by clear and convincing evidence that the defendant, in engaging in the conduct that caused Jesse Williams' death, has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

Clear and convincing evidence is evidence of such weight and quality that, even when considered in light of any conflicting evidence, leaves you with a firm conviction that the truth of the matter in question is highly probable.

You have the discretion to award, or not to award, punitive damages. In the exercise of that discretion, you may consider whether the imposition of punitive damages is necessary to punish and deter similar misconduct by defendant and others in the future.

[P. 2] In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public

knowledge but were known to and unlawfully misrepresented by the defendant.

In determining whether the defendant's conduct is such as to subject it to punitive damages, you must not allow your decision to be influenced by the defendant's financial condition, corporate status, or place of business.

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring [P. 3] lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

[ALTERNATIVE]

(1) You are not to punish the defendant for the impact of its conduct on individuals in other states.

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct — that is, how far the defendant has departed from accepted societal norms of conduct.

Factors that you may find to bear upon the degree of reprehensibility include:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;

(b) The degree of the defendants awareness of that likelihood;

(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;

(d) The duration of the misconduct and any concealment of it;

(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct.

[Excerpts of Jury Instructions]

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased,
by and through MAYOLA WILLIAMS,
Personal Representative,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

Volume 25

Circuit Court
No. 9705-03957

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 8:30 a.m., Friday, March 26, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

* * *

[Tr. 49] thrift, and the age, health, and life expectancy of the Decendent's spouse and children.

The amount of non-economic damages in the case may not exceed the sum of $1 million dollars. And that sum should be considered by you only in that it sets an upper limit.

It's my duty to tell you what the upper limit is, but it's not my intention that you should take from the fact that I'm instructing you on damages any implication about how you should decide this case.

Now, on the question of punitive damages, if the plaintiff, the Estate of Jesse Williams, prevails on either the claim of negligence or the claim of misrepresentation or both, then you must consider whether to assess punitive damages against the defendant Philip Morris.

In order for you to award punitive damages against the defendant, plaintiff must show by clear and convincing evidence that the defendant, in engaging in the conduct which was a cause of damage to the plaintiff, showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and [Tr. 50] welfare of others.

Clear and convincing evidence is evidence that makes you believe that the truth of the claim is highly probable.

If you decide that the defendant has acted as claimed by the plaintiff, then you have the sole discretion to award or not award punitive damages.

Punitive damages are awarded against a defendant to punish misconduct and to deter misconduct by defendant and others similarly situated.

Punitive damages are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.

The amount of punitive damages, if any, shall be determined and assessed based upon the following factors: First, the likelihood at the time that serious harm would arise in this state from the defendant's misconduct; second, the degree of the defendant's awareness of that likelihood, third, the profitability of the defendant's misconduct in this state;

fourth, the duration of the misconduct and any concealment of it; fifth, the attitude and the conduct of the [Tr. 51] defendant upon discovery of the misconduct; and fourth, the financial condition of the defendant.

The amount of punitive damages you assess may not exceed the sum of the $100 million dollars.

Now, I would like to go through one more time the verdict forms to be sure my explanations have been complete.

First, you have two separate claims, each of which must be considered independently and each of which must stand alone in terms of a separate verdict.

Remember that, in order to return a verdict, at least nine of you must agree on all components of the verdict for each claim on each verdict form.

And, in theory, a different set of nine of you could return a verdict on one claim than agreed on the verdict for another claim.

Everybody clear on that part? All right.

Starting with the negligence claim, Question 1 I have already reviewed. When nine of you agree on an answer, the presiding juror fills it in.

If your answer to Question 1 is no, then your verdict is for the defendant on the

* * *

[Jury Verdict]

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, Deceased,
by and through MAYOLA WILLIAMS,
Personal Representative,

Plaintiff,

vs.

PHILIP MORRIS INCORPORATED,

Defendant.

Volume 26

Circuit Court -
No. 9705-03957

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Anna J. Brown, Judge of Department No. 7C, of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 12:05 p.m., Tuesday, March 30, 1999.

* * *

Reported by Jennifer L. Wiles, CSR, RPR.

* * *

[Tr. 10] please.

THE COURT: Are we ready for the jury?

COUNSEL: Yes, Your Honor.

THE COURT: Bring them in, please.

Good afternoon, jurors.

JURORS: Good afternoon.

THE COURT: Mr. Argetsinger, you are the presiding juror?

JUROR ARGETSINGER: Yes.

THE COURT: Has the jury reached a verdict?

JUROR ARTGETSINGER: We have, Your Honor.

THE COURT: Would you hand the verdict forms, please, to Mr. Rice? Thank you.

These are verdicts in favor of the Plaintiff on both the negligence and the misrepresentation claims.

On the negligence verdict form, in answer to Question 1, "Was the Defendant negligent," the jury answered yes.

In answer to Question 2, "Was Jesse Williams also negligent," the jury has answered yes.

In answer to Question 3, the jury has allocated 50 percent negligence to each of the [Tr. 11] parties.

In answer to Question 4, compensatory damages, the jury has awarded the agreed economic damages of $21,485.80 and awarded non-economic damages of $800,000.

In answer to Question 5, "Should punitive damages be awarded," the jury has answered no.

And dated, this form, the 30thday of March.

On the misrepresentation verdict form, the jury has answered yes to Question 1.

In answer to the compensatory damages question, the same damages are entered $21,485, economic damages, $21,485.80, economic damages; and non-economic damages of $800,000.

In answer to Question 3, "Should punitive damages be awarded," the jury has answered yes.

And in answer to Question 4, "What is the amount of punitive damages," the jury has answered $79,500,000.

The form is dated the 30th of March.

Mr. Argetsinger, did at least the same nine jurors agree to each of the verdict forms?

THE WITNESS: We did, Your Honor.

THE COURT: Are there any inquiries [Tr. 12] before the verdicts are received and the jury discharged for the Plaintiffs?

MR. GAYLORD: None, Your Honor.

THE COURT: For the defense?

MR. DUMAS: Yes, Your Honor. We would request that the jury be polled individually, claim by claim.

THE COURT: I didn't hear the last.

MR. DUMAS: Individually polled, Your Honor, by question.

THE COURT: By verdict form and question?

MR. DUMAS: Yes. Yes.

THE COURT: All right.

A poll has been requested, jurors, and the poll asks that I confirm that at least the same nine jurors have agreed. And we need to do this question by question, juror by juror.

I think it's easiest if you just follow along with me with your notes on the verdict forms.

I'm going to read the question, and then your name is going to be called. And you tell me how you answered the question. If you answered, for example, yes to Question 1, say yes. If you answered no to Question 1, say no.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS, by and through MAYOLA WILLIAMS his Personal Representative

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

Case No. 9705-03957

JUDGMENT

This action came on for trial on February 22 through March 30, 1999 before the Honorable Anna J. Brown. During trial the plaintiff withdrew her claim for strict product liability. During trial Fred Meyer, Inc. was dismissed as a defendant. Plaintiff's remaining claims for negligence and misrepresentation were submitted to the jury. The jury rendered its verdicts as follows:

NEGLIGENCE

"We the jury find:

1. Was the defendant negligent as claimed in plaintiff's [P. 2] complaint, and if so, was such negligence a cause of plaintiff's damages, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: X

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

2. Was Jesse Williams negligent as claimed in defendant's answer, and if so, was such negligence a cause of plaintiff's damages?

ANSWER: Yes: X

No: _____

If your answer to question 2 "yes" [*sic*], proceed to question 3. If your answer to 2 is "no," proceed to question 4.

3. What is the percentage of each of the parties' negligence which caused damage to plaintiff?

ANSWER: Defendant: 50 %

Jesse Williams: 50 %

(The percentages must total 100%.)

If Jesse Williams' negligence was more than 50%, your verdict is for the defendant. Do not answer any more questions on this verdict form. The presiding juror should sign this verdict form. Otherwise, proceed to question 4. [P. 3]

COMPENSATORY DAMAGES

4. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

Do not reduce the damages by Jesse Williams' percentage of fault, if any, because the Court will do that when it enters judgment. Proceed to question 5.

PUNITIVE DAMAGES

5. Should punitive damages be awarded against defendant?

ANSWER: Yes: _____

No: X

If your answer to question 5 is "yes," proceed to question 6.

If your answer to question 5 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

6. What is the amount of punitive damages you award against defendant?

ANSWER: $_____

DATED this 30th day of March, 1999.

/S/ Ernest Argetsinger
Presiding Juror"

MISREPRESENTATION

"We the jury find:

1. Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of [P. 4] damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: X

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

COMPENSATORY DAMAGES

2. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

PUNITIVE DAMAGES

3. Should punitive damages be awarded against defendant?

ANSWER: Yes: X

No: _____

If your answer to question 3 is "yes," proceed to question 4.

If your answer to question 3 is "no," do not answer any further questions on this verdict form. You [*sic*] juror presiding should sign this verdict form.

4. What is the amount of punitive damages you award against defendant?

ANSWER: $ 79,500,000.00

DATED this 30th day of March, 1999.

/S/ Ernest Agetsinger
Presiding Juror" [P. 5]

The court received the verdict. In light of the jury's conclusion that decedent was 50% at fault, the verdict on the negligence claim is reduced to $10,742.90 in economic damages and $400,000.00 in noneconomic damages. On the mis-

representation claim the jury's verdict for noneconomic damages is reduced to $500,000.00 by application of ORS 18.560.

Following the verdict defendant filed a Motion for Reduction of Punitive Damages Award. After a hearing, the court reduced the punitive damages award to $32,000,000.00.

Defendant has objected to plaintiff's form of judgment. Defendant claims that the Master Settlement Agreement provides for a release (or, in the alternative, an offset) of the State of Oregon's portion of the punitive damages verdict and judgment in this case.

The Court has decided to enter judgment without adjudicating the merits of defendant's claim of release. The Court orders that the claim of release will be adjudicated in a later action. The State and the parties agree that the claim of release has been properly raised and preserved. The State and the parties further agree that adjudicating the claim of release in a later action, and not before the entry of judgment in this case, will in no way affect the rights of the State and defendant to fully adjudicate that claim and to obtain whatever relief is proper.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's claim for strict product liability is dismissed. [P. 6]

IT IS FURTHER ORDERED AND ADJUDGED that Fred Meyer, Inc. is dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the judgment for compensatory damages shall not exceed the greater amount of the award on plaintiff's claim for negligence or plaintiff's claim for misrepresentation, plus interest, costs and disbursements as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant in the amount of $521,485.80 for compensatory damages, plus interest,

costs and disbursements as provided by law, and plaintiff and the State of Oregon shall have judgment against the defendant for $32,000,000.00 for punitive damages, plus interest as provided by law.[1] [P. 7]

MONEY JUDGMENT

Judgment Creditors:	The Estate of Jesse D. Williams by and through Mayola Williams State of Oregon, Criminal Injuries Compensation Account of the Department of Justice Crime Victims Assistance Section, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section[.]"
Attorney for Judgment Creditor	Raymond F. Thomas

[1]Plaintiff disputes the State's right and interest in any of the damages.

The Estate of Jesse D. Williams by and through Mayola Williams:	Swanson, Thomas & Coon William A. Gaylord Gaylord & Eyerman
Attorney for Judgment Creditor State of Oregon:	Hardy Myers Attorney General
Judgment Debtor:	Philip Morris Incorporated

NON-ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$500,000.00
ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$21,485.80
PUNITIVE DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS and STATE OF OREGON, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section":	$32,000,000.00

[P. 8]

POST-JUDGMENT INTEREST:

Principal Amount of Money Judgment:	$32,521,485.80
Interest Start Date:	May 13, 1999
Interest Rate:	9%
Interest Type:	Simple

COSTS and DISBURSEMENTS: As provided by law and pursuant to ORCP 68.

DATED this 20th day of May, 1999.

Hon. Anna J. Brown
Circuit Court Judge

Submitted by:

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Of Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF JESSE D. WILLIAMS, by and through MAYOLA WILLIAMS, Personal Representative,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED,
Defendant.

No. 9705 03957

DEFENDANT PHILIP MORRIS INCORPORATED'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR REDUCTION OF PUNITIVE DAMAGES AWARD

INTRODUCTION[1]

Behind the facade of Plaintiff's opening rhetoric is perhaps the most revealing evidence of the weakness of her position: her defense of the mammoth punitive verdict depends on the hypothesis that she won a central issue in the case that

---

[1] This round of briefing is concerned solely with the subject of the excessiveness of the jury's $79,500,000 punitive damages verdict. In addressing that subject, we assume for purposes of argument that Plaintiff adduced sufficient evidence to permit the jury reasonably to conclude that Philip Morris had engaged in punishable fraud that was causally related to Jesse Williams' cigarette smoking during the eight years preceding the filing of the lawsuit, and that his smoking during that period was a legal cause of his death. The excessiveness issue would not otherwise be relevant. It may not need to be said — but we will say it anyway — that nothing stated in this round of briefing and argument is to be taken as a concession of any kind by Philip Morris that the evidence was in fact sufficient to support punitive liability. That issue will be the subject of briefing following entry of a judgment.

in fact she lost. The jury unanimously rejected Plaintiffs exhortation to find Philip Morris punishable for the health hazards of cigarettes. Philip Morris **therefore may not be punished for the 400,000 annual deaths attributed to smoking-related disease** (or even Oregon's share of that total), or, indeed, for its marketing of cigarettes despite knowledge that their [p. 2] consumption entails serious health hazards. Yet Plaintiff invokes these national mortality figures no fewer than four times on the first page of her brief alone. Her reason for doing so, and for inveighing irrelevantly against the dangers of smoking throughout the remainder of her memorandum, is plain. Philip Morris **was** found liable for punitive damages only on a novel theory of fraud that affected an undetermined (but surely relatively small) number of people such as Jesse Williams. That ground of liability cannot come close to supporting the jury's gigantic punitive verdict.

Plaintiff's studied disregard of the distinction between the health consequences of smoking and the conduct on which punitive liability was based in this case is well illustrated by the conclusion to Section IV(B) of her Memorandum (at 18–19) (emphasis added):

"In summary, **defendant's misconduct caused a public health disaster** far beyond any known harm produced by any other product; defendant has been perfectly aware of **the harm it has been causing** and the probability of that harm continuing; **defendant has derived enormous profits from its misconduct** over many decades while concealing it from the public."

By "defendant's misconduct," Plaintiff clearly means selling cigarettes. Plaintiff realizes that an eight-figure punitive damages exaction cannot credibly be defended except by defining the punishable conduct so broadly as to allow her to speak in terms of the creation of the world's greatest "public health disaster," with knowledge of those health conse-

quences, and the generation of "enormous profits." But her effort to alter the focus of the case is wholly improper. The only punishable misconduct found by the jury was the defrauding of Jesse Williams by the provision of a rationale that (allegedly) led him to disregard the constant barrage of warnings of the risks of smoking from the Surgeon General, a host of public health agencies, magazine articles and other media, and the very packages containing the cigarettes that he smoked. That misconduct is **far narrower** than Plaintiff's sweeping indictment of Philip Morris for the harms inherently caused by smoking. When the jury's record-shattering punishment is reviewed in relation to the

* * *

[P. 20] based upon "the same conduct" at issue here. In this section of her argument — and this section only — Plaintiff appears to recognize that constitutional constraint.

Having asked the Court not to consider *Henley*, Plaintiff nevertheless, and inconsistently, attaches a copy of the *Henley* trial judge's ruling on the post-trial motions in that case. This is, notwithstanding Plaintiff's asserted desire not to be thrown into the *Henley* briar-patch, a transparent effort to induce this Court to sustain an award in the range of that upheld in *Henley* and to influence this Court by exposing it to adverse comments regarding Philip Morris's conduct made by the California court on a different record and different jury findings. Moreover, in putting forward some "important distinctions" between this case and *Henley* that, she suggests, support an even larger award here, Plaintiff completely ignores the meaningful differences between the two cases. First, unlike *Henley*, this case involved no liability for the "targeting" of young smokers, the focal point of the finding of reprehensibility in *Henley*. Second, California is approximately ten times the size of Oregon; accordingly, any award in this case for Oregon harms should be proportionately smaller. And finally (and importantly) no consideration was

given in *Henley* to Philip Morris's significant remedial undertakings.

IV. PLAINTIFF IS NOT ENTITLED TO PRE-JUDGMENT INTEREST

Plaintiff's request for interest from the date of verdict should be rejected for two reasons. First, ORS 82.010(2)(a) does not authorize the Court to award interest from a date prior to judgment. *See Butler v. Department of Corrections*, 138 Or App 190, 909 P2d 163 (1995); *Gow v. Multnomah Hotel, Inc.*, 191 Or 45, 224 P2d 552, 228 P2d 791 (1951). As the *Gow* court explained (emphasis added):

"It is clear that the amendment to the interest statute was not intended to authorize interest from a date previous to the rendition of judgment by the court. We agree with the contention of the plaintiff only to this extent; that the amended statute does indicate a legislative intent that the actual date of the ministerial entry of judgment or decree would not be controlling **if the court had in fact pronounced judgment previous to its entry**."

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,
Plaintiff-Appellant, Cross-Respondent,
v.
PHILIP MORRIS INCORPORATED,
Defendant-Respondent,
Cross-Appellant,
and
RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,
Defendants.

Multnomah County Circuit
Court No. 9705-03957
CA A106791

DEFENDANT-RESPONDENT, CROSS-APPELLANT PHILIP MORRIS INCORPORATED'S REPLY BRIEF

Appeal From Judgment of May 25, 1999, and Order of June 22, 1999
Multnomah County Circuit Court
Honorable Anna J. Brown

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	(Continued on Reverse)

	Brief Filed: June 2001

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* * *

[P. 1] REPLY BRIEF

I. SUMMARY OF ARGUMENT.

The heart of Plaintiff's case is her claim that Philip Morris misrepresented the causal link between smoking and cancer and thereby fraudulently convinced Williams to smoke Marlboro cigarettes. In attempting to prove this claim, Plaintiff faced an insurmountable problem: The only Philip Morris representation Williams ever received concerning smoking and health was the federally mandated health warning. Because Plaintiff could not prove common law fraud, she convinced the trial court to recognize a new claim that she called "fraud on the American public." Now Plaintiff repudiates that theory, but her fallback argument is even weaker. Attempting not only to change the standard but also to shift the burden of proof to the Defendant, Plaintiff now argues that fraud can be presumed because Williams "felt deceived" and Philip Morris did not show that anyone else deceived him. No court has ever upheld a fraud verdict on that basis.

Because Philip Morris's opening brief[1] anticipated many of Plaintiff's arguments and, because reversal on the fraud claim eliminates the punitive damage award, this brief focuses primarily on the fallacies in Plaintiff's fraud claim. We also explain why Plaintiff's arguments save neither her negligence claim nor her punitive damage award.

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[1] Plaintiff's Appellant's Brief is cited here as "App. Br." Plaintiff's Reply and Cross-Responding Brief is cited here as "App. Resp." Philip Morris's Respondent's Brief and Opening Brief on Cross-Appeal is cited here as "Resp. Br." Plaintiff's Abstract is cited as "Pl. Abs."

II. ASSIGNMENT OF ERROR NUMBER ONE: PLAINTIFF FAILED TO PROVE FRAUD.

A. Plaintiff's Fraud Claim Is a Moving Target.

In attempting to defend the fraud verdict, Plaintiff abandons the arguments she made at trial, and instead seeks to rely upon a theory of fraud that the trial court refused to submit to the jury. At trial, Plaintiff argued that Philip Morris had committed a "fraud on the American public." Tr. Vol. 14-B at 102–103. According to Plaintiff, Philip Morris's alleged position that there was

* * *

[P. 13] between the fraud and negligence claims * * *." App. Resp. at 38. But the jury gave unambiguous answers to the specific questions on the verdict form, and this court is not free to speculate that the jury did not mean what it said. The jury decided not to impose punitive damages for the conduct charged as negligence. It is therefore inconsistent with the jury's verdict to justify the punitive damage award based upon that conduct.

Most of the reasons put forward by Plaintiff to support the punitive damage award relate to the general health dangers of smoking. But in light of the verdicts, this court may consider only the specific conduct for which the jury chose to punish Philip Morris — misrepresenting the causal link between smoking and cancer. Given the vast amount of information and warnings about the dangers of smoking that has long been generally published, any misstatements by Philip Morris had the potential to affect only a subset of Oregon smokers — those who clung to Philip Morris's few public statements related to smoking and cancer, while at the same time ignoring the vast amount of information about the dangers of smoking. In fact, the record contains evidence of only one such smoker — Jessie Williams. Evidence of other misconduct by Defendant, apart from the conduct for which

punishment is being imposed, cannot support the punitive award. *Jensen v. Medley*, 170 Or. App. 42, 59 n. 2, 11 P.3d 678 (2000); *Mason v. Householder*, 58 Or. App. 192, 196-97, 647 P.2d 980 (1982).

B. *Parrott* Does Not Dictate the Result Here.

Plaintiff relies heavily upon the Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), to defend the high ratio of punitive to compensatory damages resulting from the jury's punitive award, even as remitted. In fact, this case differs significantly from *Parrott*, a case in which the plaintiff's actual economic harm was small, and other lawsuits resulting from the defendant's actions were unlikely. *Parrott*, 331 Or. at 563 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809

* * *

Court of Appeals of Oregon.

Mayola WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased, Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED, Respondent-Cross-Appellant,

and

RJ Reynolds Tobacco Company, Fred Meyer, Inc., and Philip Morris Companies, Inc., Defendants.

9705-03957; A106791.

Argued and Submitted Oct. 26, 2001.
Decided June 5, 2002.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

EDMONDS, P.J.

Defendant Phillip Morris, Inc., is this country's largest manufacturer of cigarettes. Plaintiff is the widow and personal representative of the estate of Jesse Williams (Williams), who began smoking defendant's cigarettes in the early 1950s and continued until his death from a smoking-related lung cancer in 1997. Plaintiff brought this action to recover compensatory and punitive damages for Williams' death. The jury found for plaintiff on her claims of negligence and fraud, awarding economic damages of $21,485.80 and noneconomic damages of $800,000 on each claim. On the negligence claim, it found that Williams' negligence was 50 percent of the cause of his harm and declined to award punitive damages. It awarded punitive damages of $79.5 million on the fraud claim. The trial court reduced the punitive damages award to $32 million, on the ground that the jury's award was excessive under the United States Constitution, and reduced the award of noneconomic damages to

$500,000 in accordance with ORS 18.560(1). *See Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995). It then entered judgment on the fraud claim as modified.[1] Plaintiff appeals, assigning error to the reduction of the punitive damages award. Defendant cross-appeals, assigning error to a number of rulings relating to both the fraud and negligence claims. We reverse on the appeal, affirm on the cross-appeal, and remand for the trial court to enter judgment accordingly.

Because of the jury's verdict, we state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 490 91, 982 P.2d 1117 (1999). We first describe the facts relating to Williams himself, reserving most of the facts relating to defendant's conduct for our discussion of the various legal issues that the parties raise. Williams began smoking Phillip Morris cigarettes while he was in the Army in Korea in the early 1950s. The Army provided the cigarettes, and other soldiers told him that the smoke would help keep mosquitoes away. He smoked them until the mid 1950s, when he switched to Marlboros, another Phillip Morris brand. He made the switch about the time that defendant repositioned the Marlboro brand from one that was oriented toward women to one of the first male-oriented filter cigarettes. Williams continued to smoke Marlboros or Marlboro Lights for the rest of his life,[2] ultimately increasing to three packs a day. At that point he was spending half of his waking hours smoking.

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[1] The court did not reduce the award of compensatory damages on the fraud claim to reflect the jury's finding of comparative fault, which it would have done if it had based the amount of the judgment on the negligence claim. *See* ORS 18.470.

[2] There is some indication that Williams may have occasionally smoked other Phillip Morris brands. There is no evidence that he smoked non-Phillip Morris cigarettes other than incidentally.

Both Williams' wife and their children encouraged him to stop smoking, telling him that cigarettes were dangerous to his health. In response, he insisted that the cigarette companies would not sell cigarettes if they were as dangerous as his family claimed, and he stated that he had heard on television that cigarettes do not cause cancer. He quoted to them from what he said he had heard about why cigarette smoking was not harmful to a smoker's health. He also told his wife, "the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." When one of his sons would try to get him to read articles about the dangers of smoking, Williams would respond by finding published assertions showing that cigarette smoking is not dangerous.

Williams nevertheless made several unsuccessful attempts to stop smoking, trying various methods that included quitting "cold turkey," reducing the number of cigarettes, using nicotine patches, and using nicotine gum. He did not persist in any of those attempts for a significant time period. Williams' desire for cigarettes was so strong that, if he ran out of cigarettes during an ice storm, he would go to a store for cigarettes, despite the hazards of traveling in such conditions, even if he had no other reason to leave his residence. When his wife prohibited smoking in the family home, he went outdoors to smoke. At restaurants, he would leave his wife in the nonsmoking section during the meal in order to have a cigarette in the smoking section. His smoking was the major source of tension between Williams and his wife. According to an expert witness, Williams was highly addicted to cigarettes, and that addiction was physiological as well as psychological.

Williams was generally in good health and rarely saw a physician. However, in late 1995 and early 1996, he developed a cough and began, at times, to spit up blood. A radi-

ologist interpreted chest X-rays taken at that time as normal.[3] The problem recurred a few months later, and he began losing weight. X-rays and other tests in September and October led to a diagnosis of an inoperable poorly differentiated adenosquamous carcinoma in Williams' right lung. According to expert testimony, the primary cause of that kind of cancer is cigarette smoking.[4] When Williams learned of the diagnosis, he expressed a feeling of betrayal. He said, "those darn cigarette people finally did it. They were lying all the time." He wanted to let other people know that they were being deceived about the harm that cigarettes could do to them. Williams received chemical and radiation therapy that provided only temporary benefits, and he died in March 1997.

Because plaintiff's appeal relates solely to the reduction of the punitive damages award, we begin with defendant's cross-appeal. Defendant first assigns error to the trial court's denial of its motion for directed verdict on plaintiff's fraud claim. Resolving that assignment depends on understanding plaintiff's theory concerning how defendant made material misrepresentations of fact, how the misrepresentations were made to Williams, and how he relied on them. In Oregon the elements of fraud are:

"(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's

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[3] Both plaintiff's and defendant's radiologists at trial agreed that, viewed in retrospect, those X-rays showed a tumor. The course of Williams' cancer would not have been different if it had been diagnosed at that time, according to the testimony.

[4] Defendant's experts testified that Williams had an extremely rare form of lung cancer that is not related to smoking. Plaintiff presented contrary evidence, and the jury by its verdict implicitly accepted plaintiff's view.

ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury."

Conzelmann v. N.W.P. & D. Prod. Co., 190 Or. 332, 350, 225 P.2d 757 (1950).[5] A plaintiff must prove each element of the tort by clear and convincing evidence, or evidence that establishes that the truth of the facts alleged is highly probable. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or. 390, 392, 402, 737 P.2d 595 (1987).[6]

Also, the trial court held that two separate legal principles impose significant limitations on plaintiff's claims. First, ORS 30.905(1), the statute of ultimate repose, extinguishes claims for injuries that occurred more than eight years after a product is first purchased. Plaintiff therefore had to prove that the cigarettes that Williams purchased after September 1, 1988, which the parties treated as eight years before his injury, were a substantial factor in causing his cancer and death. Secondly, under 15 U.S.C. § 1334, the federally required warning that appears on each cigarette package preempts all state regulation of the advertising and promotion of cigarettes that carry the warning. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527–28, 112 S. Ct. 2608, 120 L. Ed .2d 407 (1992), the United States Supreme Court held that the preemption extends to state common-law claims as well as to state statutes and regulations. Thus, plaintiff may

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[5] The Supreme Court has suggested that those nine requirements may unduly fractionalize the essential elements of a fraud claim. For example, proof of reliance on a fraudulent statement may be sufficient in itself to prove the hearer's ignorance of the falsity of the statement. *See Briscoe v. Pittman*, 268 Or. 604, 610, 522 P.2d 886 (1974).

[6] A plaintiff may prove compensatory damages arising out of the fraud by a preponderance of the evidence. *Riley Hill General Contractor*, 303 Or. at 392 93, 737 P.2d 595. Punitive damages require proof by clear and convincing evidence. ORS 18.537(1).

not base her fraud claim on allegations that defendant fraudulently concealed information concerning smoking and health. She is limited to allegations of affirmative misrepresentations. Neither party challenges on appeal the trial court's rulings regarding the statute of ultimate repose and the effect of 15 U.S.C. § 1334.

Defendant's primary argument on cross-appeal focuses on the first, seventh, and eighth elements of fraud, involving the alleged representations and Williams' reliance on them. Defendant asserts that there is no evidence that it made any representation to Williams or that Williams relied on *any* representation that it may have made. Defendant asserts,

"The essence of a claim of fraud is a communication by the defendant which is received and relied upon by the plaintiff. As Plaintiff acknowledged, she could not prove any such communication by Phillip Morris to Williams. Therefore her fraud claim fails."

Defendant interprets the requirement that plaintiff rely on a misrepresentation as meaning that "an alleged false representation must be identified specifically so that it can be critically examined." According to defendant, plaintiff cannot prove her claim without proof that defendant made a specific misrepresentation to Williams.

Defendant interprets the cases on which it relies for support as standing for more than they do. The cases that defendant cites either simply repeat the requirement that there be a misrepresentation, *see, e.g., Gregory v. Novak*, 121 Or. App. 651, 654, 855 P.2d 1142 (1993), or describe the required level of specificity for pleading fraud. *See, e.g., Palmberg v. City of Astoria*, 112 Or. 353, 369–70, 228 P. 107; 229 P. 380 (1924). As we discuss below, a defendant may be liable for fraud for a misrepresentation that creates a false impression even though it is impossible to identify the specific misrepresentation on which a person relied.

Defendant's argument goes to the heart of plaintiff's theory of fraud. In contrast to most fraud cases, plaintiff does not rely on one or a few fraudulent statements made to one or a few identifiable individuals. Rather, her theory is that defendant, in concert with other tobacco companies, engaged in a decades-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke. In order to evaluate that theory, we first discuss the facts and legal authorities that support it, again stating the evidence in the light most favorable to plaintiff, as required by our standard of review.

The first significant publicity about the effects of cigarette smoking on health came in the early 1950s, based on studies that showed that cigarette tar could cause cancer in mice and that established statistical correlations between smoking and lung cancer. Apparently as a result, total cigarette sales fell in 1953 for the first time in the twentieth century. In response to the publicity and falling sales, defendant, in cooperation with other tobacco companies, began a concerted campaign to undercut the impact on smokers and potential smokers of concerns about the consequences of smoking. The theme of the industry's publicity campaign, which continued into the 1990s, was that the effect of cigarette smoking on health was unclear and that more research was needed before a definitive answer would be possible. As plaintiff explains in her reply brief:

"Defendant understood that it could never prove [that] cigarettes [are] safe; it was enough, however, to make it appear that there was a legitimate controversy over the link between cigarettes and lung cancer so as to give smokers like

Jesse Williams something to tell themselves while they continued smoking. The message [that] defendant communicated to Jesse Williams to create the necessary uncertainty was the message that there was doubt about the causal link between cigarette smoking and human disease."

According to plaintiff, defendant communicated this message to Williams and to smokers and nonsmokers throughout Oregon and the rest of the United States over several decades. What makes the message fraudulent, in plaintiff's view, is that defendant knew that there was no legitimate controversy about the health effects of smoking and that defendant itself had no doubt that cigarette smoking carried serious health risks, including the risk of lung cancer.

Defendant attacks both the legal and factual bases for plaintiff's theory, asserting that there "is not a shred of evidence that Williams ever saw or heard a false or misleading statement made by or attributable to Phillip Morris." Defendant emphasizes plaintiff's concession that she cannot point to a specific misrepresentation that Williams received. Rather, according to defendant, plaintiff is trying to recover for what plaintiff described to the trial court as a "fraud on the American public." Based on that understanding, defendant treats plaintiff's theory as a variation of the securities law concept of "fraud on the market." Under that concept, a purchaser or seller of stock may recover against a party whose fraudulent statements affected the market in which the plaintiff bought or sold, even if the plaintiff never personally received or otherwise knew of the misrepresentations. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248 and n. 27, 108 S. Ct. 978, 99 L. Ed .2d 194 (1988). Defendant then describes its reasons for believing that that theory, to the degree that it is valid in the securities context, does not apply to this case.

We disagree with defendant's effort to characterize plaintiff's theory.[7] Rather, plaintiff's theory fits comfortably within traditional common-law principles.[8] Liability for fraud is not limited to those who deal directly with the injured party. Rather, a person who makes a misrepresentation may be liable to the intended recipients of a misrepresentation without regard to whether the person making the representation intends to defraud a particular person. As the Supreme Court said over 75 years ago, quoting a legal encyclopdia, it is a general rule of law in this country that:

"'Where misrepresentations are made to the public at large, or to a particular class of persons, with the intention of influencing any member of the public, or of the class, to whom they may be communicated, any one injured through proper reliance thereon may secure redress. In such a case it is not necessary that there should be an intent to defraud any particular person; but the representation must of course have been intended for the public, or for a particular class of persons to which the complainant belonged.'" *Coughlin v. State Bank of Portland*, 117 Or. 83, 96, 243 P. 78 (1926), *quoting* 26 CJ 1121–23, § 48bb.

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[7] Plaintiff's statements to the trial court on which defendant relies in support of its characterization were made in the context of her explanation that "there were so many misrepresentations, so many attempts to create false impression, * * * plaintiff cannot now point to one[.]"

[8] In its verdict, the jury answered "yes" to the following question:

"Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?"

The issue that the jury decided, thus, was based on traditional fraud concepts, not on the theory that defendant claims was the basis of plaintiff's case at trial.

In *Coughlin*, the plaintiff alleged that the defendants published misleading statements of a bank's financial condition and that the plaintiff relied on those statements in deciding to purchase stock in the bank. The Supreme Court held that the plaintiff's complaint stated a claim for fraud and entitled him to present his supporting evidence. *Id.* at 105, 243 P. 78.

In addition, under Oregon law, a defendant may make misrepresentations in many different ways.

"To communicate a representation it is not necessary that the party should speak words, or write a message. The desired result may be accomplished ofttimes by conduct. Indeed, the tongue and the pen are only two of the numerous means of transmitting messages. * * * Indeed, the action for deceit * * * had its origins in false impersonation." *Pennebaker v. Kimble et al.*, 126 Or. 317, 322-23, 269 P. 981 (1928).

As examples of conduct that communicates representations, the *Pennebaker* court mentioned a buoy in a harbor warning of a shoal, a check drawn on a bank implying an amount on deposit to cover it, and Paul Revere's lanterns. It then quoted a New Jersey case, which itself quoted an encyclopedia, that held that a misrepresentation "'may consist in the creation of a false impression by words or acts, or by any trick or device, a deep laid scheme of swindling, or a direct falsehood, a combined effort of a number of associates or the sole effort of a solitary individual.'" *Id.* at 323-24, 269 P. 981, *quoting Berkowitz v. Lyons*, 98 N.J.L. 198, 119 A. 20, 21-22 (1920), *quoting* 12 RCL 232.

Thus, under Oregon law, plaintiff does not need to prove that defendant expressly directed its misrepresentations to Williams or even knew of his existence, so long as plaintiff can show that Williams was within a class of people whom defendant intended to be recipients of and to rely on the message that it conveyed. In addition, the fundamental character of fraud is the communication of a misimpression to induce

another to rely on it. That is something that a defendant may do by a variety of actions as well as by specific statements. Plaintiff alleges that the message that defendant intended to convey was that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health and that it intended to encourage smokers to continue to smoke and not to make the necessary effort to stop smoking. As a smoker, Williams was an intended recipient of defendant's message.

The evidence would permit the jury to find that defendant conveyed the message that plaintiff describes over many years and in many ways, intentionally creating an impression on which it intended Williams and other smokers to rely. The length of the time over which defendant conveyed the message, and the nature of the misrepresentations on which Williams relied, make it unlikely that plaintiff could single out a specific instance from all of the representations that Williams received. Defendant's purpose was to create an impression in the public's mind-including smokers like Williams-that the health issue remained undecided.[9] In late 1953, after the early studies linking cigarette smoking with cancer and the apparently connected fall in cigarette sales, a number of tobacco companies, including defendant,[10] joined

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[9] Plaintiff also presented evidence showing that advertising for Marlboros emphasized images of healthy and strong men. The apparent purpose of that evidence was to show that the advertising created an impression that contradicted the idea that smoking could cause disease. Because there is sufficient evidence of direct representations to support the jury's verdict, we do not need to consider whether defendant's advertising strategy would also be relevant for that purpose.

[10] At the time, defendant was the fifth largest tobacco company in the country. In large part due to the success of Marlboros, its market share grew over the following years until it reached its current status of having approximately half of the domestic market for cigarettes.

to hire a leading public relations firm to find a way to counter their effect. The first step in their subsequent campaign was the publication in January 1954 of "A Frank Statement to Cigarette Smokers."[11] Defendant and the other leading tobacco companies, together with several associations of tobacco growers and marketers, signed the statement, which appeared in 448 newspapers. The publicity covered the great majority of the country's population. In the "Frank Statement," the signatories stated that they believed that their products were not injurious to health and announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco use and health." In 1964, the TIRC was divided into the Tobacco Institute, which focused on public relations and lobbying, and the Council on Tobacco Research (CTR), which supported scientific research.

According to plaintiff's evidence, the "Frank Statement" was the beginning of a "common front" approach among tobacco companies on the health issue, with all companies expressing essentially the same message and using the TIRC and its successors to speak for the industry as a whole. Their original position was to deny that there was a problem; thus in the 1950s and early 1960s Phillip Morris officials represented publicly that the company would "stop business tomorrow" if it thought that its products were harmful. However, as evidence of the harmful effects of tobacco in-

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[11] The trial court ruled that there was no evidence that Williams relied on the "Frank Statement," and plaintiff does not challenge that ruling on appeal. The "Frank Statement" remains relevant, however, as evidence of the beginning of a campaign on which, the jury could have found, Williams did rely. The court instructed the jury that it could consider the "Frank Statement" as relevant to defendant's knowledge or state of mind.

creased,[12] the industry took a different approach. Particularly after the 1964 Surgeon General's report, which emphasized the connection between smoking and lung cancer, the industry focused on keeping the "controversy" alive and calling for "more research" for the purpose of suggesting that the health question about cigarette smoking was not yet clear. In an internal memorandum shortly after the 1964 report, a Phillip Morris vice president explained that it was necessary to "provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." From the evidence in this case, the jury could properly infer that Williams was one of those smokers to whom defendant was referring.

Defendant and the industry continued throughout the 1970s, 1980s, and 1990s to encourage the impression that there was a genuine and continuing controversy. They did not expressly deny that cigarettes caused cancer but instead provided smokers what a Tobacco Institute memorandum described as "ready-made credible alternatives" to that conclusion by suggesting that there were other factors involved in the diseases of which smokers died and by emphasizing that there was "no proof that smoking causes cancer." The jury in this case could find from the evidence that, in making those statements, they relied on criteria for proof of causation that the scientific community generally either had never accepted or had since discarded. Although defendant and the industry[13] emphasized the need for research, and although it is inferable from the evidence that defendant and other to-

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[12] One of plaintiff's expert witnesses testified that, by the late 1950s, there could no longer be a genuine scientific question about the connection between smoking and lung cancer.

[13] The Tobacco Institute, rather than defendant itself, made many of the statements on which plaintiff relies. The jury could find that in making those statements the Tobacco Institute acted on behalf of defendant and other cigarette manufacturers.

bacco companies conducted a great deal of research into tobacco themselves and sponsored other researchers, they consciously avoided research in the United States that might indicate the biological effects of tobacco use and thus resolve the question that, they claimed, most needed further research. In particular, defendant conducted all sensitive research in a laboratory that it purchased in Europe, taking care to avoid preserving records of the results in this country. The person who was defendant's director of research in the late 1970s and 1980s told a subordinate that one of the director's functions was to "fuel the controversy" as to whether cigarettes cause disease. The director explained that it was his job "to attack outside reports of links between smoking and cancer or smoking and emphysema or things of that sort by maintaining that there's a controyersy and providing the information that would discredit or somehow cast [doubt] on the outside research."

Defendant and the tobacco industry promoted their message through a large number of press releases and statements and through less obvious methods, including influencing the content of apparently neutral articles and cultivating "opinion leaders" who would convey their message. They attempted to used the power of their advertising to procure favorable treatment from the print media. Industry spokespersons appeared on news shows on commercial and public television to state their position on smoking and health issues. The theme of their statements was that the evidence concerning the health effects of tobacco was based primarily on statistical relationships and that there was no proof that a specific tobacco component caused a specific disease. In addition, they suggested that there could be other causes, not connected to tobacco use, for the various diseases attributed to smoking. Although by the early 1990s the industry was forced to agree that tobacco could be a risk factor associated with a number of diseases, its spokesmen still publicly asserted that there was a long chain of intervening events in-

volved before a disease arose from cigarette smoking. Defendant also stated publicly that it did not believe that cigarette smoking was addictive.

There is evidence that Williams received the message that defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes.[14] Williams read the *Oregonian*, other newspapers and magazines, and watched television, all of which were media through which defendant conveyed its message. The evidence includes examples of newspaper stories describing the dangers of tobacco that also contain statements from industry spokespersons insisting that the dangers were not proved and at times attacking the validity of the research suggesting harmful effects. Industry newspaper advertisements conveyed the same message. For instance, in an article published in the *Oregonian* in 1991, an industry spokesman said that the dangers were not proven and argued that the money that the CTR spent on research showed how open-minded the industry was.

Williams' own statements show that he received and relied on defendant's misrepresentations. When Williams' family urged him to stop smoking, he responded that what he had seen on television demonstrated that smoking did not cause cancer. When his son gave him articles on the subject, he responded by finding his own articles that countered the

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[14] Defendant points to the large amount of information available to Williams that emphasized the dangers of smoking to health. Plaintiff does not disagree with that point. Rather, her argument is that defendant created a controversy in order to give smokers like Williams a reason to continue smoking despite the information concerning the dangers. Plaintiff makes the argument, which the jury was entitled to believe from the evidence, that defendant knew that smoking was harmful to health but instead misrepresented that fact to the public for its own economic gain.

dangers of smoking. After his diagnosis, he told his wife that the "cigarette people" had deceived him, that he had been betrayed, and that "they were lying all of the time." The jury could find from the evidence that no one other than defendant and the rest of the tobacco industry promoted the message to which Williams referred. Because of his exclusive use of Phillip Morris products, the jury could also conclude that he meant defendant when he referred to the "cigarette people."[15] Thus, the evidence supports a reasonable inference that Williams purchased cigarettes after September 1, 1988, in reliance on defendant's previous and continuing representations and that those cigarettes were a substantial factor in causing his lung cancer. Consequently, the trial court did not err in denying the motion for a directed verdict on the fraud claim.

Defendant raises no issues concerning the amount of compensatory damages awarded to plaintiff on the fraud claim. Because the award of compensatory damages on the fraud claim is greater than the award of compensatory damages on the negligence claim due to the effect of the comparative negligence verdict, we need not consider defendant's assignments of error concerning the negligence claim. The trial court properly entered judgment for plaintiff for compensatory damages on the fraud claim.

We turn to the issue of punitive damages. We first consider the requirements for an award of punitive damages and the standard by which we review a jury's decision to make

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[15]. Defendant argues that the only message that it is certain that Williams received was the health warning on each pack of cigarettes. There is evidence that Williams handled the packs in such a way that he seldom saw the warning. More significantly, when his wife drew his attention to the warning, Williams responded, "This is what the Surgeon General says, it's not what [the] tobacco company says." The existence of the warning was only one factor for the jury to consider in determining whether Williams reasonably relied on defendant's representations.

such an award. ORS 18.537(1) and ORS 30.925(2) establish the criteria for the jury to apply in deciding whether to award punitive damages and in determining their amount. ORS 18.537(1) provides that, in order to recover punitive damages, the plaintiff must prove by clear and convincing evidence "that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

ORS 30.925(2) establishes more specific criteria for awarding punitive damages in a product liability civil action: "Punitive damages, if any, shall be determined and awarded based upon the following criteria.

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

If a jury awards punitive damages, both the trial and appellate courts review the amount of the award to determine whether it meets the statutory and constitutional standards.

The legislature has codified the Supreme Court's statement of the nature of that review:

"If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding." ORS 18.537(2); *see Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 551 n. 10, 17 P.3d 473 (2001) (stating that ORS 18.537(2) codifies the standard established in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S. Ct. 1847, 134 L. Ed .2d 948 (1996)).

The heart of the standard for reviewing awards of punitive damages, thus, is determining whether the award is one that a rational juror could make in light of the record as a whole and the legal factors that justify an award of punitive damages on the specific type of claim. In *Parrott*, the Oregon Supreme Court recently held that the rational juror standard is consistent with the federal Due Process standard discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed .2d 809 (1996). The Court said that the Gore guideposts, together with the Oregon statutory standard, establish five criteria that a court should consider in determining the range that a rational juror would be entitled to award:[16]

"(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages

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[16] The trial court held that the jury's award of punitive damages was proper under the Oregon statute, but it reduced the award on the ground that it was excessive under the federal constitution. It reached that conclusion before the decision in *Parrott* and thus did not have the benefit of the Supreme Court's analysis in that case.

award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct[.]" *Parrott*, 331 Or. at 555, 17 P.3d 473.

Defendant argues that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed .2d 674 (2001), undercuts the continuing vitality of *Parrott*. In *Cooper Industries*, the United States Supreme Court held that an appellate court must review a trial court's decision on whether an award of punitive damages is excessive as a matter of law rather than for an abuse of discretion.[17] In reaching that conclusion, the Court stated that the amount of a punitive damages award is not a finding of fact that implicates the Seventh Amendment's limitations on judicial review of jury awards. Defendant argues that that holding in *Cooper Industries* weakens the premise of *Parrott*, which defendant identifies as treating the review of a punitive damages award as the review of a factual determination by a jury. Rather, according to defendant, it is now clear that the imposition of punitive damages is not based on findings of fact but on the application of a constitutional standard to the facts of a case. Thus, according to defendant, the rational juror standard of *Parrott* does not satisfy constitutional requirements.

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[17] The phrase that the *Cooper Industries* Court used was "*de novo*" review. As we have previously noted in discussing *Cooper Industries*, that is not a phrase that Oregon courts apply to the review of legal holdings; it is properly limited to the review of factual findings. *See Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 50 n. 2, 35 P.3d 1106 (2001), *rev. pending* (2002); *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 302 n. 5, 27 P.3d 1092 (2001), *rev. pending*.

We disagree with defendant's understanding of *Cooper Industries*. The background for that case was the Court's long-established rule that the Seventh Amendment forbids appellate review of federal district court refusals to set aside jury awards of compensatory damages on the ground that they are excessive. The Court modified that rule several years before *Cooper Industries* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed .2d 659 (1996).

In *Cooper Industries* the Court held that a jury's determination of the *amount* of punitive damages was not a "fact" within the *Gasperini* rule and thus was subject to a broader scope of appellate review than it had established in that case. *See* 532 U.S. at 437–40 and n. 11, 121 S. Ct. 1678. However, it also recognized that determining the amount of punitive damages is a "fact-sensitive undertaking" that is appropriately left to the discretion of the jury. *Id.* at 437–38 n. 11, 121 S. Ct. 1678. The Court noted in *Cooper Industries* that the district court had instructed the jury concerning the factors for it to consider in awarding punitive damages. It then stated that, "'[a]lthough the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.'" *Id.* at 439 n. 12, 121 S. Ct. 1678. Finally, the Court reaffirmed that the *Gore* criteria are the appropriate criteria for reviewing an award of punitive damages for excessiveness. *Id.* at 440, 121 S. Ct. 1678.

The Court in *Cooper Industries*, thus, recognized the jury's primary role in finding the facts relevant to an award of punitive damages, in determining whether to make such an award, and in establishing the appropriate amount. *Cooper*

Industries, in our view, does not alter the criteria by which a trial court is to review that award and, thus, does not affect the Oregon Supreme Court's discussion of those criteria in *Parrott*. Rather, what *Cooper Industries* does is to require an appellate court to review the trial court's decision on the amount of punitive damages as a matter of law-that is, by plenary review-rather than for an abuse of discretion. *See also Bocci v. Key Pharmaceuticals, Inc.*, 178 Or. App. 42, 50-51, 35 P.3d 1106 (2001), *rev. pending* (2002). That is consistent with the way that we have always reviewed trial court decisions regarding punitive damages. *See, e.g., MacCrone v. Edwards Center, Inc.*, 160 Or. App. 91, 106, 980 P.2d 1156 (1999), *vacated and remanded* 332 Or. 41, 22 P.3d 758, *adhered to on remand* 176 Or. App. 355, 31 P.3d 513 (2001), *rev. den.* 334 Or. 190 (2002); *Blume v. Fred Meyer, Inc.*, 155 Or. App. 102, 114, 963 P.2d 700 (1998). We therefore follow the *Parrott* criteria, including the reasonable juror standard, in reviewing the jury's award against defendant, and we give no deference to the trial court's decision on the issue.

We first consider defendant's two assignments of error concerning the jury instructions on punitive damages. Defendant assigns error to the trial court's failure to instruct the jury that its award should bear a reasonable relationship to the harm caused to Williams. However, the proposed instruction would also have told the jury not to punish defendant for alleged misconduct towards other persons who might bring their own cases and receive their own punitive damages awards. In *Parrott*, the Supreme Court made it clear that the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages. 331 Or. at 563, 17 P.3d 473. The proposed instruction's speculative reference to unknown other lawsuits by unknown other plaintiffs was contrary to that principle. It was also inconsistent with ORS 30.925(2)(g), which allows

the jury to consider other punishments already imposed on the defendant. Because the proposed instruction was incorrect in that respect, we do not need to consider whether the rest of it was correct. The trial court properly rejected it. *See Simpson v. Sisters of Charity*, 284 Or. 547, 560, 588 P.2d 4 (1978) (trial court not required to give instruction that contains, in part, erroneous language).

Defendant also assigns error to the trial court's instruction that the maximum amount that the jury could award was $100 million. It argues that that instruction told the jury that it could award an amount that would have been far greater than what was constitutionally permissible. Plaintiff's complaint prayed for $100 million in punitive damages. The trial court in its instruction merely told the jury what plaintiff sought. Defendant did not move to reduce the amount of the prayer on the ground that it was greater than the evidence would support or that it sought an impermissible amount. In addition, telling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial practice. *See Wiebe v. Seely Administrator*, 215 Or. 331, 357, 335 P.2d 379 (1959).

We now evaluate the jury's award for excessiveness under the previously stated criteria. We begin by stating the relevant evidence that we have not previously described, again stating it in the light most favorable to plaintiff. *Parrott*, 331 Or. at 556, 17 P.3d 473. In addition to the evidence that defendant intentionally made false representations to Williams and that he relied on them to his detriment, plaintiff points to five categories of evidence to support the jury's award of punitive damages in the amount of $79.5 million.[18]

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[18] Defendant asserts that, because the jury declined to award punitive damages on the negligence claim, it could consider only evidence relevant to the fraud claim in determining whether to award punitive damages and in determining their amount. The evidence that defendant seeks to exclude from our review of the jury's deci-

First, there is evidence that defendant knew that smoking caused lung cancer and other diseases at the same time that it publicly claimed that the issue was unresolved. As early as 1958, three British scientists, meeting with scientists and tobacco executives, reported that industry representatives believed that smoking could lead to lung cancer. In 1961, defendant's director of research stated internally that "carcinogens are found in practically every class of compounds in smoke" and that the best that the company could hope to do was to reduce their amounts. Later, defendant's internal memoranda made similar points, in some instances suggesting that the company could not admit the facts publicly because of the probable adverse legal consequences.

Second, defendant recognized that nicotine was both addictive and the primary reason why people continued smoking. The strongest statement of this fact may have been a presentation by a Phillip Morris scientist in 1972. In that presentation, he stated that the "cigarette should be conceived not as a product but as a package. The product is nicotine[.]" He continued, "[t]hink of the cigarette pack as a storage container for a day's supply of nicotine," and "[t]hink of the cigarette as a dispenser for a dose of nicotine." Defendant spent considerable effort in the following years studying the best way to deliver the optimal dose of nicotine in each cigarette and to increase the effectiveness of the nicotine, resulting in the discovery of a number of ways of manipulating the material in cigarettes for that purpose without actually adding nicotine to it.

Also, defendant carefully evaluated smoking cessation programs and technologies, concluding that alternative sources of nicotine, such as patches or gum, were ineffective

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sion relates to the consequences of defendant's fraudulent conduct, which is certainly relevant to an award of punitive damages. The evidence was admitted without limitation, and the jury was entitled to consider it.

in the absence of ongoing behavioral therapy. Because that therapy was expensive and time consuming, defendant thought it unlikely that it would have a serious effect on the number of smokers. Defendant's public relations program of creating a controversy that would give smokers a "crutch," a reason to believe that there were serious doubts that tobacco was harmful, thus, would discourage them from making the significant effort that was necessary to stop smoking. The "controversy" created by the tobacco industry was defendant's method of counteracting the information that otherwise suggested the harmfulness of cigarettes. Such an approach was aimed particularly at highly addicted smokers like Williams, who would search for any justification to continue smoking.

Third, defendant conducted research in such a way as to avoid studying the health effects of smoking, all the while asserting publicly that there was need for further research on that very issue. It used the CTR's research as a shield and as a source for expert witnesses at congressional hearings and in lawsuits against it rather than for research into the relationship between smoking and disease. The jury could have found on the record in this case that defendant specifically avoided testing with live animals and testing actual production cigarettes. On one occasion when defendant did test production cigarettes, the results were unfavorable, and it destroyed them. It is inferable from the record that tobacco industry lawyers, rather than scientists, set the general direction of the CTR's research program and that they did so for the purpose of protecting the industry's litigation position rather than to resolve scientific questions.

Also, the jury could have found that the tobacco industry had a "gentleman's agreement" not to conduct research beyond the scope of the CTR's efforts. Thus, to the degree that defendant conducted animal testing that was relevant to the relationship between cigarette smoking and human disease, it did so in a European laboratory and took precautions to en-

sure that the results of that research did not appear in its American records.

Fourth, defendant's actions caused harm to many others in Oregon besides Williams. Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, defendant concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from defendant and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences.

Finally, cigarettes are relatively inexpensive to produce, and they provide a large profit margin. By maintaining a large population of smokers through fraudulent representations, defendant protected those profits. At the time of trial, defendant's net worth was over $17 billion. Its profit from cigarette sales in 1996, the year that Williams was diagnosed with lung cancer, was over $2 billion. In 1997, the year that Williams died and the most recent year for which figures were available at the time of trial, defendant's profit was $1.6 billion.

In light of the above evidence, we turn to the applicable criteria for an award of punitive damages.[19] First, the jury

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[19] The legislature first adopted those criteria for awarding punitive damages in 1979, Or. Laws 1979, ch. 866, § 3, although at least some of them reflect previous case law. Defendant thus was on

could find that there was a strong likelihood at the time of defendant's fraudulent statements that serious harm would arise from them. ORS 30.925(2)(a). Even at the beginning of defendant's public relations scheme, it was generally recognized that cigarette smoking had probable serious health consequences. Viewing the evidence most favorably to plaintiff, there was little doubt about the relationship between smoking and lung cancer by the late 1950s, and there was absolutely no basis for a genuine dispute on the issue by the 1970s and 1980s. Throughout that period, defendant continued its public relations campaign asserting that smoking had not been proven to be harmful and that more research was necessary. Its campaign was intended to give smokers a crutch to justify their continued smoking, and the jury could reasonably conclude that the message that defendant disseminated would put all of those who relied on it at risk and would cause serious harm to many of them.

Second, the jury could find that, by 1958, defendant was aware of the likelihood of the harm that its actions would cause and that it was certainly aware of that harm by the 1970s. ORS 30.925(2)(b). Third, defendant's misconduct was highly profitable, producing billions of dollars of profit over many years. There is evidence that defendant believed, in fact, that its misrepresentation of the dangers of smoking was important to its ability to continue in the cigarette business. ORS 30.925(2)(c). Fourth, defendant's misconduct lasted over four decades, and defendant concealed it as long as it could. The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s. ORS 30.925(2)(d). Fifth, there is no evidence

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notice of the possibility of a punitive damages award under Oregon law for its conduct 17 years before Williams was diagnosed with lung cancer and 9 years before September 1, 1988, the beginning of the period during which plaintiff had to prove that cigarette smoking was a substantial factor in causing Williams' death.

that defendant showed any regret or changed its conduct upon the discovery of its actions. ORS 30.925(2)(e). Sixth, defendant is a wealthy corporation, and a small award of punitive damages would have little effect on it. ORS 30.925(2)(f). Finally, there is no evidence in the record of other punishment (including other punitive damages awards) inflicted upon defendant as a result of its misconduct. ORS 30.925(2)(g).

We turn next to the criteria that the United States Supreme Court identified in *Gore* and that the Oregon Supreme Court adopted in *Parrott*. The first *Gore* criterion concerns the state interests that an award of punitive damages is designed to serve. Those interests involve the health and lives of the state's citizens and residents. It is difficult to perceive how the state could have any greater interest than the preservation of the health and the lives of the citizens who make up the state. In *Waddill v. Anchor Hocking, Inc.*, 175 Or. App. 294, 27 P.3d 1092 (2001), *rev. pending* (2002), we held that there is a state interest in preventing injury to Oregon consumers from defective products and in punishing manufacturers who fail to investigate the safety of their products. 175 Or. App. at 306, 27 P.3d 1092. Here, the jury could find that defendant did not simply fail to investigate the safety of its products; it knew that they were unsafe and entered on a course of fraudulent conduct designed to encourage Oregon smokers to continue using those products despite the danger to their health.

The second *Gore* criterion concerns the reprehensibility of the defendant's actions. The jury could find from the evidence that defendant sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death to a significant percentage of those who used it as intended. Because defendant's product affected the lives and the health of consumers as well as the economic interests of both consumers and non-

consumers, and because it occurred over an extended period, that conduct is far more reprehensible than the unlawful methods of selling used automobiles by the defendant that the *Parrott* court considered. In light of the Supreme Court's decision in that case, the comparative harm in this case strongly suggests an award of punitive damages.

The third *Gore* factor is the disparity between the punitive damages award and the actual or potential harm inflicted. Defendant argues that the primary issue in evaluating this factor is the ratio between plaintiff's compensatory damages and the punitive damages award. It notes that the jury's verdict would produce a ratio of 97 to 1, while the ratio after the court's remittitur is 39 to 1. It discusses a number of other cases in which the ratios between the plaintiff's injuries and the punitive damages award were considerably less and refers to several United States Supreme Court cases that appeared to give the ratio significant weight in determining whether an award was excessive. The difficulty with this approach is that, as the Oregon Supreme Court pointed out in *Parrott*, the federal court's treatment of the subject demonstrates that "no 'simple mathematical formula' controls our review of the ratio of punitive damages to actual and potential harm." 331 Or. at 563, 17 P.3d 473. That is not surprising, because it is inherently impossible to capture all of the qualitative factors that go into determining the appropriate level of punishment in one simple ratio.

In *Parrott*, the Supreme Court affirmed a verdict in a case of consumer fraud in which the ratio between punitive and compensatory damages was 87 to 1. In doing so, it explained:

"Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers. Additionally, although the actual economic harm that plaintiff suf-

fered in this proceeding was relatively small, that harm was the result of defendant's 'particularly egregious' acts." 331 Or. at 563, 17 P.3d 473.

In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott*, were "particularly egregious" and thus justify particularly strong judicial punishment. *See Lane County v. Wood*, 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury.

Beyond that, defendant's narrow focus on the ratio between punitive and compensatory damages ignores the underlying purpose for awarding punitive damages, which is to punish and deter a wrongdoer. The reprehensibility of the defendant's actions, the number of people affected or potentially affected, and indications that the defendant will not change its actions without punishment are all relevant factors. It is also clear that the defendant's wealth is an important consideration; an award that might be a serious punishment for one defendant could be only a minor inconvenience for another. *See Hicks v. Lilly Enterprises*, 45 Or.App. 211, 217, 608 P.2d 186 (1980). Oregon law has recognized that principle for over 60 years. *See State ex rel Thesman v. Dooley*, 270 Or. 37, 42, 526 P.2d 563 (1974); *Lamb v. Woodry*, 154 Or. 30, 47, 58 P.2d 1257 (1936); *see also* Restatement (Second) of Torts, § 908 and comment e (1979). In this case, defendant's net worth is over $17 billion, and its profits for the year closest to the trial were over

$1.6 billion, or approximately $30.7 million per week. The jury's award of $79.5 million, thus, is equal to a little more than two and a half weeks' profit.

Thus, there are at least two factors for determining the disparity between the punitive damages award and the actual harm inflicted in addition to the ratio to which defendant gives so much attention. First, when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider the effect of that conduct on those other people. Although defendant is legitimately concerned that there may be future punitive damages awards that, combined with the one in this case, would be excessive in total, ORS 30.925(2)(g) provides the appropriate method of avoiding that result. By requiring the jury and court to consider the total deterrent effect of other punishment imposed on defendant, including other punitive damages awards, it will permit future juries and courts to take previous awards into account when they set or evaluate punitive damage awards in future cases. The alternative to that approach is to limit punitive damages in this case to an amount that may be inadequate, based on speculation of what might happen in some unknown future case.

The second additional factor is that there is more to the issue of proportionality than the dollar amounts involved. First, when the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence. The same dollar amount will have a very different effect, for example, on a small, struggling business from what it will have on a large, profitable one. Second, some kinds of harm cannot be fully captured in money value. In this case, for example, the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in

light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused.[20]

The final *Gore* criterion concerns the civil and criminal penalties that could be imposed for comparable misconduct. The court in *Parrott* appears to have treated this factor as primarily related to fair notice to the defendant of the extent of punishment that the state might impose for its actions. 331 Or. at 563-64, 17 P.3d 473. Oregon law does not provide administrative or other civil sanctions for defendant's actions. Plaintiff argues, however, that first-degree manslaughter, ORS 163.118(1)(a), and second-degree manslaughter, ORS 163.125(1)(a), which impose penalties for reckless homicide, are relevant to this factor. The problem, as defendant points out, is that it is difficult to compare the criminal sentences available under the manslaughter statutes with the economic sanction of punitive damages, particularly when the defendant is a corporation. We do not believe that this factor plays a major role one way or the other. To the extent that the issue involves adequate notice to defendant, the established Oregon law of punitive damages, including ORS 30.925(2), was sufficient to alert defendant to the possible punishment for its fraudulent scheme. After consideration of all of the above factors, we conclude that the jury's

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[20] Defendant also suggests that it is being punished for its participation in a public debate concerning a matter of general importance and that that punishment violates Article I, section 8, of the Oregon Constitution. Defendant ignores that the jury could have found that, rather than engaging in a public debate, defendant made representations concerning the relationship between smoking and human health either without believing them to be true or in reckless disregard of their truth or falsity and that it did so to induce people like Williams to continue using its products. That kind of fraud is not something that the Oregon Constitution protects. *See Smallwood v. Fisk*, 146 Or. App. 695, 934 P.2d 557 (1997) (punitive damages for fraud are a historical exception to Article I, section 8).

award was not excessive under the criteria identified in *Parrott* and *Gore*, and the trial court therefore erred in reducing it.

Finally, defendant argues that the trial court erred in refusing to exercise its discretion under ORS 18.537(3) to reduce the jury's award to reflect a settlement that it and other cigarette manufacturers had reached with 46 states. That statute authorizes a court to reduce an award if the defendant establishes that it has taken reasonable remedial measures to prevent recurrence of the conduct that gave rise to the punitive damages award. Defendant argues that the settlement with the state qualifies under the statutory criteria. The trial court denied the motion on the ground that the settlement did not constitute an unequivocal acceptance of responsibility, which it believed was necessary to meet the criteria for a reduction in the jury's award under the statute. Plaintiff also argues that, to the extent that the statute permits a court to reduce a jury's award based on evidence that was not before the jury, the statute violates Article VII (Amended), section 3, of the Oregon Constitution.

We do not need to decide whether either defendant or plaintiff correctly understands the import of the statute. The factual foundation of defendant's argument is the Consent Decree and Final Judgment[21] that resolved the litigation between defendant and the State of Oregon. Section VI(G) of that judgment provides, in part:

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[21] Despite its caption, the document at issue is simply a judgment. Since the effective date of the Oregon Rules of Civil Procedure, "judgment" has been the sole correct term for the final determination of the rights of the parties in a civil action. "Decree," which formerly referred to the final determination of the rights of the parties in a suit in equity, is no longer appropriate. *See* ORCP 2; ORCP 67 A; *Webber v. Olsen*, 330 Or. 189, 192 n. 1, 998 P.2d 666 (2000).

"*Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments* with respect to this Consent Decree and Final Judgment by the State of Oregon or any Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment." (Emphasis added.)

The trial court could not use the settlement as a basis for reducing the jury's verdict without the consent judgment somehow being in evidence. By its own terms, which reflect defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purpose for which defendant seeks to use it in this case. The trial court did not err.

We do not discuss the remaining arguments of the parties because there would be no benefit to the bench or bar from our doing so.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

Or. App., 2002.

Williams v. Philip Morris Inc.

182 Or. App. 44, 48 P.3d 824, Prod. Liab. Rep. (CCH) P 16,327

CERTIORARI GRANTED

SUPREME COURT OF THE UNITED STATES

No. 05-1256

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

May 30, 2006

The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.